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SHORT PROCEEDINGS AND ORDERS DATE: [06/06/91]

CASE NBR: [901074653] CFH STATUS: [DECIDED]
SHORT TITLE: [Gaskins, Donald]
VERSUS [McKellar, Warden] DATE DOCKETED: [03/53/1]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Feb 4 [91]	G	Application (A90-536) to extend the time to file a petition for a writ of certiorari from February 14, [91] to March 16, [91], submitted to The Chief Justice.
2	Feb 7 [91]		Application (A90-536) granted by the Chief Justice extending the time to file until March 15, [91].
3	Mar 15 [91]	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Apr 16 [91]		Brief of respondent Kenneth D. McKellar, warden in opposition filed.
7	Apr 22 [91]		Reply brief of petitioner Donald H. Gaskins filed.
8	Apr 25 [91]		DISTRIBUTED. May 3, [91]
9	May 24 [91]		REDISTRIBUTED. May 30, [91]
11	Jun 3 [91]		Petition DENIED. Concurring opinion by Justice Stevens. Justice Blackmun would grant certiorari, vacate the judgment and remand to the United States Court of

*** Related Case - Use VIDE,LS with HF ***

Last page of docket

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	DATE	NOTE	PROCEEDINGS & ORDERS
11	Jun 3 [91]		Petition DENIED. Concurring opinion by Justice Stevens. Justice Blackmun would grant certiorari, vacate the judgment and remand to the United States Court of Appeals for the Fourth Circuit for further consideration in light of Yates v. Evatt, 500 U. S. ------ ([99]). (Detached opinion.) Justice Marshall dissenting. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 231 ([976]), I would grant certiorari and vacate the death sentence in this case.

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*** Related Case - Use VIDE,LS with HF ***

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EDITOR'S NOTE:

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-[illegible]

DONALD HENRY GASKINS,

Petitioner,

v.

KENNETH D. MCKELLAR, Warden, South Carolina Department of Corrections, and the Attorney General of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did this Court's per curiam decision in Cage v. Louisiana, which disapproved of reasonable doubt instructions materially identical to those given in this case, announce a "new rule" of criminal procedure inapplicable in a habeas corpus proceeding?

2. Whether the definition of "reasonable doubt" employed by the trial court during his charge lessened the state's burden of proof in violation of the Fourteenth Amendment and the due process principles of In re Winship and Cage v. Louisiana?

3. Whether the state's admission of evidence that petitioner had previously been sentenced to death, and information regarding other plea bargains petitioner had entered into, coupled with the trial court's jury instructions, violated the Eighth and Fourteenth Amendments?

4. Whether a constitutionally impermissible burden shifting instruction regarding implied malice was harmless beyond a reasonable doubt?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Donald Henry Gaskins, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

CITATION TO OPINIONS BELOW

Petitioner was convicted of murder and subsequently sentenced to death on March 26, 1983. The convictions and sentence were affirmed on direct appeal by the South Carolina Supreme Court. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120 (1985).

Petitioner filed an application for post-conviction relief in

the Richland County, South Carolina, Court of Common Pleas on August 6, 1985. J.A.[1] 651. An evidentiary hearing was held on March 21, 1986, and relief was denied on June 6, 1986. J.A. 723-876; 878. The South Carolina Supreme Court denied petitioner's petition for writ of certiorari on January 7, 1987, as did the United States Supreme Court. Gaskins v. South Carolina, 482 U.S. 909 (1987).

A petition for a writ of habeas corpus was filed in the United States District Court for the District of South Carolina on August 11, 1987. The district court referred the case to Magistrate Charles W. Gambrell, who, on January 27, 1989, recommended that the district court dismiss the petition. J.A. 1070. The district court entered summary judgment for the respondents on August 2, 1989. J.A. 1312. Petitioner filed a motion to alter or amend the judgment, pursuant to Fed.R.Civ.P. 59(e), on August 11, 1989. J.A. 1332. The motion was denied on August 28, 1989. J.A. 1350. Petitioner filed a timely notice of appeal and moved for a certificate of probable cause to appeal on September 26, 1989. J.A. 1367. The district court granted a certificate of probable cause to appeal on October 2, 1989. On October 15, 1990, the District Court's order was affirmed by the United States Court of Appeals for the Fourth Circuit. Gaskins v. McKellar, 916 F.2d 941

[1]"J.A." refers to the joint appendix filed in the United States Court of Appeals for the Fourth Circuit in connection with petitioner's appeal.

(4th Cir. 1990).[2] Petitioner's application for rehearing with suggestion for rehearing in banc was denied by the Fourth Circuit on November 16, 1990.[3]

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing with suggestion for rehearing in banc was entered November 16, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's case involves the Eighth Amendment to the United States Constitution which reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves Section One of the Fourteenth Amendment which states in part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was an inmate at Central Correctional Institution (CCI) in Columbia, South Carolina, when he was charged with killing

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[2]A copy of this opinion is attached to this petition for the Court's convenience.

[3]A copy of this order is attached to this petition for the Court's convenience.

a death row inmate, Rudolph Tyner, on September 12, 1982. Tyner had been sentenced to death for the murder of a Mr. and Mrs. Moon during a robbery that occurred on March 18, 1978, and was housed on death row in Cell Block Two (CB-2) in CCI. Petitioner was assigned as the "building man" in CB-2, and in that capacity, performed electrical and other repairs.

Tyner's murder victims were survived by a daughter and a stepson, Tony Cimo. The state's evidence at trial tended to show that Cimo, distraught over his parent's deaths, discussed with an acquaintance the possibility of having Tyner killed by a CCI inmate. Numerous collect telephone calls were subsequently made from CB-2 to Cimo and his acquaintance. The key to the state's case against petitioner was the testimony of James Brown. Brown, a convicted double-murderer incarcerated in CB-2, testified that petitioner had asked him to deliver a speaker device to Tyner, and to tell him to plug it into a wire sticking through the bottom vent of Tyner's cell, which adjoined petitioner's. Brown delivered the package and the message. According to his testimony, a few minutes later he heard an explosion. Afterwards, he claimed that he entered petitioner's cell and saw him pulling a wire into it through a vent.

There was, however, substantial conflicting evidence about petitioner's whereabouts immediately after the explosion, as well as Brown's involvement in the crime. Petitioner presented several witnesses at the guilt-or-innocence phase of his trial who testified that petitioner could not have detonated the explosive

device from where he was immediately after the explosion. Petitioner was found guilty and sentenced to death. Tony Cimo, the person who ordered Tyner's death, subsequently pled guilty to conspiracy to commit murder and was sentenced to five years imprisonment.

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

The panel opinion of the Court of Appeals for the Fourth Circuit held that the "substantial-doubt portion of the [reasonable doubt] instruction did not rise to the level of a due process violation," and the "negative effects of the substantial-doubt instruction" were neutralized in the context of the entire instruction. Gaskins v. McKellar, 916 F.2d 941, 952 (4th Cir. 1990). As to the Caldwell v. Mississippi, 472 U.S. 320 (1985), violation, which occurred when the state introduced evidence of petitioner's previously vacated murder conviction and was aggravated by the trial court's repeated use of words to the effect that the jury's binding verdict was only a recommendation; the Court of Appeals concluded that "this evidence and the judge's statement `had no effect on the sentencing decision.'" Gaskins, 916 F.2d at 953 (quoting Caldwell v. Mississippi, 472 U.S. at 341). The Court of Appeals' opinion did note that

> we believe a wiser course would have been for the trial judge to explicitly instruct the jury that the word "recommendation" meant "binding recommendation," under the circumstances, we are satisfied that the jury was properly aware of its sentencing responsibilities.

Gaskins, 916 F.2d at 953. Finally, the Court of Appeals agreed that the malice instruction given at petitioner's trial constituted

an impermissible burden-shifting instruction, but found that any error was harmless beyond a reasonable doubt. Id. at 952.

REASONS THE WRIT SHOULD BE GRANTED

I. Cage v. Louisiana did not create a new rule of criminal procedure, and is therefore fully applicable in collateral proceedings.

Because this case arises on collateral review, and because petitioner relies in part on the authority of a decision of this Court handed down after his conviction became final, the retroactivity of Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990) (summary reversal), is to be treated as a "threshold issue." Teague v. Lane, 489 U.S. 288, 300 (1989). It is plain, however, that Cage represents nothing more than a straightforward application of the "bedrock, axiomatic and elementary' principle" enunciated in In re Winship, 397 U.S. 358 (1970), that the state must bear the burden of proving any criminal accusation beyond a reasonable doubt. Id. at 363-64 (citation omitted). As Yates v. Aiken, 484 U.S. 211 (1988), makes clear, this Court does not establish a "new rule" for purposes of retroactivity analysis whenever it decides whether a particular jury instruction comports with this well-settled due process requirement. In Yates, this Court held that Francis v. Franklin, 471 U.S. 307 (1985), did not establish a new rule when it applied the constitutional principle of Sandstrom v. Montana, 442 U.S. 510 (1979), to a case involving jury instructions which differed slightly from those declared unconstitutional in Sandstrom. In the same way, Cage v. Louisiana

simply applied the rule of Winship to jury instructions which manifestly failed to convey the reasonable doubt standard. As this Court stated in United States v. Johnson, 457 U.S. 537 (1982),

> [W]hen a decision of this Court merely has applied settled precedents to a new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

Id. at 549. Since Cage represents nothing more than the application of In re Winship to a particular set of jury instructions, it can not obviously be said that Cage "altered [Winship] in any material way." United States v. Johnson, 457 U.S. at 549. Put differently, the jury instructions unanimously disapproved in Cage would not have seemed any more consonant with federal due process requirements at any time after Winship and Sandstrom than they do now. Accordingly, this Court's holding in Cage is equally applicable to this case, and requires that petitioner's conviction and sentence of death be reversed.[4]

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[4]Although respondents submitted their brief to the Fourth Circuit Court of Appeals after Teague v. Lane was decided, they did not assert that petitioner was requesting a new nonretroactive rule be established in his case. Therefore, respondents have waived the issue of retroactivity. See Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1990) (the state waived the right to argue that an intervening decision of the Supreme Court did not apply retroactively by not advancing the position in the district court).

II. The trial court's instructions regarding reasonable doubt impermissibly lessened the state's burden of proof in violation of the Due Process Clause of the Fourteenth Amendment.

At the conclusion of the guilt-or-innocence phase of petitioner's trial, the trial court defined the concept of "reasonable doubt" for the jury as follows:

> Now, what is a reasonable doubt? First of all, let me tell you what it is not. A reasonable doubt is not some imaginary doubt or some slight doubt or some fanciful doubt that you might have. A reasonable doubt is simply stated a doubt for which you can give a reason. It is a substantial doubt . . . .

J.A. 439 (Tr. 4188, lines 11-16) (emphasis added).

> The two phases, beyond a reasonable doubt and proof to a moral certainty are synonymous and the legal equivalent of each other. These phases connote; however, a degree of proof distinguished from an absolute certainty. The reasonable doubt that the law in its mercy gives the benefit of the accused is not a weak or a slight doubt as I told you earlier, but a serious or strong and well founded doubt as to the truth of a charge.

J.A. 444 (Tr. 4193, lines 5-12) (emphasis added).[5] Petitioner has maintained throughout this litigation that these jury instructions impermissibly relieved the state of its burden of proving his guilt beyond a reasonable doubt imposed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

This Court, in a unanimous per curiam opinion, recently held that a state trial court violated the due process principles

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[5]The trial judge relied on this same definition of reasonable doubt at the penalty phase of petitioner's trial. "As you will recall, I told you what beyond a reasonable doubt means." J.A. 611 (Tr. 4408, lines 9-10).

established in In re Winship, 397 U.S. 358 (1970), when it defined reasonable doubt as "such a doubt as would give rise to a grave uncertainty," "an actual substantial doubt," and by comparing reasonable doubt with proof to a "moral certainty." Cage, 111 S.Ct. at 329.[6] This Court rejected the Louisiana Supreme Court's determination that the instructions as a whole accurately conveyed the concept of reasonable doubt, finding it "plain . . . that `substantial' and `grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Id. at 329-30.

The condemned reasonable doubt instruction in Cage is in all material respects identical to the charge given at petitioner's trial.[7] While the trial judge in petitioner's case did not use

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[6]The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970); see also Jackson v. Virginia, 443 U.S. 307, 315-16 (1979). The Supreme Court has consistently recognized that the reasonable doubt standard is a bedrock element of due process and "plays a vital role in the American scheme of criminal procedure." Winship, 397 U.S. at 364. The Court has also emphasized that, "[i]n the administration of justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503 (1976).

[7]The instruction in Cage provided in relevant part:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Id. at 329 (emphasis in original).

the term "grave" to modify "doubt," he did describe a reasonable doubt as a "substantial doubt," and not a "slight," "imaginary," or "fanciful" doubt. A reasonable doubt was further described as a "serious," "strong," and "well founded doubt." In addition, the trial judge advised the jury that a reasonable doubt was one for which a juror "can give a reason," and, as in Cage, he stated that a reasonable doubt was a "substantial doubt." The instructions in petitioner's case also additionally contained the language condemned in Cage that a reasonable doubt is "synonymous" with "moral certainty." Thus it is at least as true here, as it was in Cage, that the charge "suggest[ed] a higher degree of doubt than is required for acquittal," and further when the charge is considered as a whole, "it [is] clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." Cage, 111 S.Ct. at 330.

In addition to these similarities, petitioner's case also contains several significant factors not present in Cage which made the misdefinition of reasonable doubt here all the more prejudicial. First, the prosecutors predicted and stressed the erroneous

instructions in their argument to the jury, and admonishing the jury to pay particular attention to this part of the judge's charge. Specifically, the first prosecutor argued the following to the jury:

> You are going to hear a lot about reasonable doubt, over and over. Reasonable doubt. They are probably going to get up here and make some argument about a bird in the hand. All of these arguments that we heard over and over. Well, that's all fine. And a reasonable doubt is not any doubt. You can have a doubt in your mind that Tyner's dead. You haven't even seen his dead body. You haven't seen him buried. You can have a doubt about that. But it's not a reasonable doubt. And what we are talking about a reasonable doubt is a substantial doubt, everything in our lives is subject to some doubt so don't cast off and put on that ship that they will attempt to put you on with reasonable doubt. And you remember what his honor, Judge Laney, tells you. He will tell you that it's real and substantial. Not some imaginary or fanciful doubt that they can come up with.

J.A. 364-65 (Tr. 4113, line 22 to tr. 4114, line 12) (emphasis added).[8] This undue emphasis and erroneous advice highlighted the prejudice of the improper jury instructions. See Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1441, 1451 (1990) (fact that prosecutor stressed erroneous jury instructions in argument is an important consideration in assessing prejudice); California v. Brown, 479 U.S. 538, 546 (1987) (O'Connor, J., concurring) (same).

Another feature of the record in this case which was apparent-

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[8]The second prosecutor to argue warned the jury not to be taken in by doubts that were created by the case since they were not "reasonable."

> [W]hat they want to do is focus on these other issues hoping that you will develop some doubts that are not reasonable but you will confuse them with reasonable doubts. It is trickery.

J.A. 386 (Tr. 4135, lines 22-25).

ly not present in Cage was the trial judge's repeated reminders that whenever he used the term "reasonable doubt," the jury was to recall the meaning of reasonable doubt as "I told you earlier," J.A. 444, and "as you will recall, I told you what beyond a reasonable doubt means." J.A. 611. These insistent reminders, like the prosecutor's emphasis on the instructions in his jury argument, only increased the prejudicial effect of the reasonable doubt instructions in this case.[9]

It is for these reasons that this Court's reasoning in Cage compels that this Court reverse petitioner's conviction and sentence. As was noted above, the trial court's reasonable doubt instruction in petitioner's case contains the same defects identified in Cage. Significantly, the Cage instructions, like those given here, included strong affirmations of the state's duty to prove guilt beyond a reasonable doubt. The erroneous instructions in Cage, moreover, were given by way of contrast to doubt founded upon "mere caprice or conjecture," and to "mere possible doubt." Id. at 329. Similarly, most of the challenged instructions in this case were given by way of contrast to a "weak or a

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[9]Cage controls this case in yet another respect. Here, as in Cage, the lower courts thought the misdefinition of reasonable doubt to have been ameliorated by the context in which it occurred. Like the Louisiana Supreme Court in Cage, the court of appeals panel relied on the fact that the term "substantial" doubt was used by way of contrast to doubts which were merely "imaginary," "slight," or "fanciful." Gaskins v. McKellar, 916 F.2d 941, 952 (4th Cir. 1990). Although the same was undeniably true of the instructions in Cage, this Court recognized that use of such terms as "substantial," "grave," and "moral certainty" nevertheless had the effect of unconstitutionally lessening the state's burden of proof.

slight doubt," and an "imaginary," "slight," and "fanciful" doubt.

III. The Eighth and Fourteenth Amendments were violated by permitting the state at the sentencing phase of petitioner's trial to introduce both evidence that a prior sentence of death imposed upon petitioner had been vacated by the South Carolina Supreme Court and evidence as to why the state did not seek the death penalty in another case against petitioner. This error was exacerbated by the trial court's instructions to the jury.

A. THE EVIDENCE PRESENTED.

A former prosecutor, Kenneth Summerford, was permitted to testify at the penalty phase of petitioner's trial that petitioner had previously been sentenced to death in 1976 for the death of Dennis Bellamy. J.A. 543-44. Additionally, he was permitted to testify that the South Carolina Supreme Court had subsequently declared the death penalty statute under which petitioner had been sentenced unconstitutional and, therefore, had vacated his death sentence and imposed a sentence of life imprisonment. J.A. 544. Finally, Summerford was permitted to explain why he had decided to permit petitioner to enter into a plea bargain agreement for a life sentence in connection with the death of Johnny Knight and others in 1978, as well as why he had not sought the death penalty in that case. Id.

Petitioner does not, of course, dispute that evidence of any prior constitutionally obtained convictions was admissible and

relevant at the penalty phase of his bifurcated trial. However, the fact that he had previously been sentenced to death was certainly not relevant or admissible, and the introduction of this evidence constituted an arbitrary factor. See generally Booth v. Maryland, 482 U.S. 496 (1987).

In Caldwell v. Mississippi, 472 U.S. 372 (1985), this Court held that a prosecutor's comments, during his penalty phase summation, that any sentence of death imposed would be reviewed by the Mississippi Supreme Court violated the Eighth Amendment. This Court reasoned that this type of argument implied that "the responsibility for defendant's death sentence rests elsewhere." 472 U.S. at 380. Thus this Court concluded that because "the jury's sense of responsibility for determining the appropriateness of death" was minimized by the state's argument, the resulting sentence of death did "not meet the standard of reliability that the Eighth Amendment requires." Id.

The constitutional principle established in Caldwell is equally applicable under the facts of this case. The fact that petitioner had been previously sentenced to death, only to have the sentence reversed by the appellate courts and a sentence of life imprisonment imposed, could only have diminished the juror's sense of responsibility for making the awesome determination as to whether petitioner should be sentenced to life imprisonment or the death penalty. See Woodson v. North Carolina, 428 U.S. 280

(1976).[10] Most significantly, the testimony caused the jury to believe that their responsibility for determining petitioner's fate was not final. The issue of appellate review was intentionally injected into the proceedings in a dramatic and misleading fashion. Not only did the testimony of former prosecutor Summerford imply that any death sentence imposed would be fully reviewed by the appellate courts, it also went one step further and expressly stated that, on at least one other occasion, the South Carolina Supreme Court had vacated a death sentence secured against petitioner and required that he be sentenced to life imprisonment. These comments were bolstered by the trial judge's remarks concerning the fact that no valid death penalty law existed at the time of several other prior murders. J.A. 549. Thus the jury was informed not only of the role of the appellate courts, but was also left with the impression that the South Carolina Supreme Court or this Court might again invalidate South Carolina's death penalty statute. The jury was not told, however, that the current statute had been found to meet existing constitutional standards, or that the state courts rarely order that a person be sentenced to life imprisonment if his death sentence is reversed. See State v Shaw, 273 S.C. 194, 255 S.E.2d 799, cert. denied, 444 U.S. 957, reh. denied, 444 U.S. 1027 (1979). Thus petitioner's death sentence

[10] See People v. Davis, 452 N.E.2d 525, 537 (Ill. 1983) (Illinois Supreme Court concluded that information that the defendant had been sentenced to death for another murder diminished the jury's sense of responsibility; "knowledge that twelve other people determined that he should be executed could have swayed the juror's verdict in favor of death").

contains the same constitutional flaws found in Caldwell.

Furthermore, this testimony was meant to convey to the jury that petitioner had narrowly escaped the death penalty on prior occasions; once on a mere legal technicality and another time because there was not a valid death penalty law in effect. In essence, the thrust of the testimony was that regardless of whether petitioner should be sentenced to death for the offense he was being tried for--the murder of convicted murderer and death row inmate Rudolph Tyner--he should have been executed for his prior offenses. Further, because a prior death sentence had been vacated by an appellate court, the jury could in effect reimpose that sentence, which was vacated on legal technicalities. The prosecutor's closing arguments made this point in dramatic fashion. Even a cursory review of the state's summations reveals that they concentrated primarily on petitioner's prior offenses. See, e.g., J.A. 574-76; 581-82. While it was permissible to refer to petitioner's prior convictions (assuming they were constitutionally obtained), the evidence regarding his prior death sentence was irrelevant and diminished the jury's responsibility by informing them that another jury, at another time, had determined that petitioner should die. This information was not germane to the jury's sentencing decision, and clearly constituted an arbitrary factor, thus undermining the reliability of the resulting sentence of death.

It was also improper to allow the prosecutor to explain why he did not seek the death penalty against petitioner in 1978.

Allowing Summerford to explain why he believed he could not secure a valid death sentence against petitioner only exacerbated the previously referred to Caldwell errors. The evidence was misleading, and once again injected the issue of the intervention of the appellate courts into the jury's decision making process. Such matters could only have conveyed to the jury that no matter what sentence it imposed, an appellate court would carefully review, and in all likelihood intervene in, any decision it made.

B. THE TRIAL COURT'S CHARGE.

This Caldwell error was exacerbated by the trial judge's penalty phase charge which diminished the jury's sense of responsibility for determining petitioner's fate by instructing the jury that its verdict was merely advisory rather than binding. At the beginning of the penalty phase of petitioner's trial, the trial judge informed the jury:

> 'So our purpose in conducting this proceeding in which we are now engaged is to determine whether the defendant Donald "Pee Wee" Gaskins should be sentenced by the court to death or life imprisonment. With respect to your particular role in this proceeding, you will be asked to recommend to the Court whether it should sentence the defendant, Donald "Pee Wee" Gaskins to death or to life imprisonment.

J.A. 501. The court went on, in his opening remarks, to describe the jury's role as being that of making a sentencing recommendation on four other occasions. During his charge at the conclusion of the penalty phase, the trial judge described the jury's role as being to recommend a sentence, or to issue a recommendation, at least forty times. J.A. 610-21. The trial judge never instructed the jury that its verdict was in fact binding, and that the

sentence the jury recommended would in fact be the sentence imposed by the court. The written statutory sentencing forms submitted for the jury's use in determining petitioner's sentence again referred to the decision as a "recommendation of sentence," and the language of the verdict form was that the jurors "recommend to the court" that the defendant "Donald "Pee Wee" Gaskins be sentenced to death." Tr. 4546-48. These misleading instructions violated the Eighth Amendment principles set forth in Caldwell v. Mississippi, 472 U.S. 320 (1985).

First, the jury's sentencing decision is not advisory. S.C. Code §16-3-20(C) (1988 Cum. Supp.) provides that "[w]here a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death." (emphasis added). The effect of this statutory provision, as the South Carolina Supreme Court recognized in State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, cert. denied, 444 U.S. 957 (1979), is that "[w]hen the trial jury is the sentencing authority, its recommendation for punishment is binding on the court." Id. at 802.

The trial judge in this case did not merely refer to the jury's sentencing verdict as a "recommendation." He also prefaced his charge with a misleading and prejudicial series of statements indicating that he would impose sentence on the murder charge, and that the jury's function was merely to assist him in determining the sentence he would impose. The remainder of the judge's introductory remarks emphasized that the judge, not the jury, would actually impose petitioner's sentence. In assessing the effect of

these introductory remarks, it must be kept in mind that in its plain and ordinary meaning, the term "`[r]ecommendation' refers to an action which is advisory in nature rather than one having any binding effect." Black's Law Dictionary 1144 (5th Ed. 1979). Similarly, "recommend" means "to counsel or advise." American Heritage Dictionary 1034 (College Ed.2d 1982). Given this commonly accepted usage of the term "recommend," a term which the trial judge used no fewer than forty-six times throughout his opening remarks and penalty phase charge, it was obviously essential that the jury understand that its sentencing was in fact not advisory but binding, and that its sentencing recommendation would actually be imposed as the sentence of the court. The trial judge's charge, however, had just the opposite effect. Instead of making clear that the jury would make the actual determination of petitioner's, the trial judge stressed that he would be the one to impose sentence, and characterized the jury's role as one of rendering assistance to the judge in the determination of what that sentence should be. Under these circumstances, it is impossible that any member of the jury recognized the true gravity of their sentencing responsibility.

In Caldwell, this Court held that a prosecutor's jury argument, which suggested that the state supreme court would review the appropriateness of any death sentence which the jury might impose, violated the Eighth Amendment. This Court concluded that this type of argument minimized "the jury's sense of responsibility for determining the appropriateness of death," and that such

tactics created a constitutionally-intolerable risk of unreliability and bias in the sentencing process. 472 U.S. at 330-34, 341. Caldwell established that the error involved in this case was a federal constitutional violation, and thus that review of this claim must be governed by federal constitutional standards.[11] As other courts have recognized, the Caldwell principle necessarily covers comments or instructions by the trial judge which indicate that the jury's role in the proceedings is merely advisory. See Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987) (en banc), rev'd on procedural grounds, ___ U.S. ___, 109 S.Ct. 1211 (1989); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied ___ U.S. ___, 109 S.Ct. 1353 (1989); Frye v. Commonwealth, 345 S.E.2d 267 (Va. 1986).

In addition, Caldwell establishes an extremely stringent standard of appellate review. Pursuant to Caldwell, a statement by a trial judge or prosecutor, which a reasonable juror might interpret as lessening the jury's responsibility, requires that any ensuing death sentence be vacated unless the reviewing court can say that the statement "had no effect on the sentencing decision." 472 U.S. at 341; see also Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731 (1991). This rigorous "no-effect" standard makes it extremely difficult for the state to demonstrate that a Caldwell error was

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[11]Therefore, this Court may not simply rely on the intended legal import of the trial judge's instructions, but rather must pay "careful attention to the words actually spoken to the jury, . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514 (1979); see also Mills v. Maryland, 486 U.S. 367 (1988).

harmless beyond a reasonable doubt, especially under the facts of this case, where there was substantial mitigating evidence presented at trial.

The error which the trial judge committed here was as unnecessary as it was unfair. Even before Caldwell, the large majority of South Carolina trial judges had made a practice of clearly advising capital sentencing juries of the binding nature of their recommendation.[12] In this way, the majority of the state trial judges in South Carolina have faithfully adhered to the principle set forth in Caldwell and thus avoided the risk that "[a] defendant might . . . be executed, although no sentencer had ever made a determination that death was the appropriate sentence." 472 U.S. at 331-332.

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[12]Typical of these instructions is the following charge given by Judge William H. Ballenger in State v. Smith, 286 S.C. 406, 334 S.E.2d 277 (1985), cert. denied, 475 U.S. 1031 (1986):

> You will notice that I have used the word "recommendation" in referring to your decision on the question of what punishment the defendant should receive. I have used this word because it is the word used in the statute itself. But it is important to understand that your decision as to the sentence is really more than a "recommendation" as you or I might use that word in everyday speech. I tell you this because the law provides that whatever your recommendation is, I as the trial judge accept it. Therefore, you should understand that whatever your recommendation might be, that recommendation will in fact be the sentence which will be imposed upon the defendant.

Id., Transcript of Record at 1285.

IV. The malice instructions given at petitioner's trial were not harmless beyond a reasonable doubt.

The South Carolina Supreme Court held on direct appeal that the trial court's charge regarding presumed malice was an impermissible burden shifting instruction. State v. Gaskins, 284 S.C. at 120.[13] The court determined, however, that the constitutional error was harmless beyond a reasonable doubt. Id. at 122. The magistrate, district court, and the court of appeals concurred that the malice instruction was an unconstitutional burden shifting instruction. J.A. 1180-81; 1326-27; see also Francis v. Franklin, 471 U.S. 307 (1985); Hyman v. Aiken, 824 F.2d 1405 (4th Cir. 1987) (identical instruction found to violate Francis). However, they also determined that the error was harmless.

The harmless error decision rendered by the courts below cannot withstand an analysis of the record evidence. In Rose v. Clark, 478 U.S. 570 (1986), the Supreme Court adopted the harmless error standard of Chapman v. California, 386 U.S. 18 (1967), to determine whether a burden shifting instruction was harmless beyond a reasonable doubt. Thus, pursuant to Rose, a court reviewing the effect of an impermissible burden shifting instruction must determine "whether the evidence is so dispositive of [malice] that [the] reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption."

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[13]The relevant part of the court's charge was: "I charge you further that while malice is presumed from the use of a deadly weapon or from a dangerous instrument . . . ." J.A. 442.

478 U.S. at 583.[14]

In this case, the evidence of malice was far from overwhelming. The cause of death was an explosion, but the primary evidence of malice came from several murderers, also incarcerated in CB-2.[15] Thus it cannot be said that the state has proved

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[14]It is also must be noted that this Court has heard argument in Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989), cert. granted, 111 S.Ct. 41 (1990) (No. 89-7691), to consider the following three questions:

> Does South Carolina's "harmless error" analysis of the Sandstrom errors in this case, in which the state court considered neither petitioner's defense nor the jury's likely interpretation of the unconstitutional instructions, conflict with the requirements of Rose v. Clark and Carella v. California?
>
> Should the Court grant certiorari to enforce its two prior remand orders instructing the South Carolina Supreme Court "to grant the relief which federal law requires?"
>
> Should the Court grant certiorari to clarify the harmless-error analysis to be employed in cases involving burden-shifting mandatory presumptions?

The same harmless error analysis utilized by the South Carolina Supreme Court in Yates v. Aiken was utilized by the lower courts in petitioner's case.

[15]The state court's harmless error determination rested on two erroneous grounds. First, the court believed that the error was harmless because petitioner did not dispute that the killing was done intentionally. State v. Gaskins, 284 S.C. at 121. This is clearly incorrect. The state has the burden of proof on all the essential elements of the crime, malice of course being one of the elements of murder, and a defendant can elect to put the state to its burden of proof without that constituting some sort of waiver. Second, the state court held that the charge was harmless because petitioner admitted at the penalty phase of his trial that he was involved in the conspiracy to kill Tyner but did not actually participate in the killing. Id. at 123. This also is incorrect. The jury had already found petitioner guilty of murder (after receiving the impermissible instruction), thus petitioner's statement to the jury at a subsequent stage of the proceedings regarding why he should not receive the death penalty cannot

beyond a reasonable doubt, which is its burden, that the jury could not have relied upon the presumption in determining that the killing was performed with malice. For this reason, the error was not harmless beyond a reasonable doubt, and petitioner's conviction is constitutionally infirm.

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fairly--or constitutionally--support a determination that the burden shifting malice charge was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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BY: _____
ATTORNEYS FOR PETITIONER

March 15, 1991.

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Donald Henry GASKINS, Petitioner-Appellant,

v.

Kenneth D. McKELLAR, Warden, Central Correctional Institution; Attorney General of South Carolina, T. Travis Medlock, Respondents-Appellees.

No. 89-4011.

United States Court of Appeals, Fourth Circuit.

Argued March 7, 1990.

Decided Oct. 15, 1990.

Defendant, whose murder conviction and death sentence had been affirmed by South Carolina Supreme Court, 284 S.C. 105, 326 S.E.2d 132, sought federal habeas corpus review. The United States District Court for the District of South Carolina, George Ross Anderson, Jr., J., dismissed habeas petition without evidentiary hearing. Defendant appealed. The Court of Appeals, Phillips, Circuit Judge, held that: (1) dismissal was appropriate of invalid-use-of-confession claim on basis of its palpably incredible nature and, in any event, denial of evidentiary hearing was harmless beyond reasonable doubt; (2) state trial judge's questioning of certain witnesses did not render defendant's trial fundamentally unfair; (3) state trial judge's comment to press following guilt phase of trial did not create fundamentally unfair trial; (4) trial court's refusal to exclude juror who admitted during voir dire that, in his opinion, defendant should have been executed for previous murders, was not constitutional error; (5) any impropriety in restricting defendant's cross-examination of prosecution witness on direct examination of defense witness was harmless beyond reasonable doubt; (6) improper burden shifting instruction was harmless beyond reasonable doubt; and (7) admission of evidence that prior death sentence of defendant had been vacated did not violate defendant's Eighth Amendment rights, nor did trial court's use of word "recommend" in connection with jury's return of sentence of life imprisonment or death.

Affirmed.

1. Habeas Corpus ⇐742

Where allegations in a habeas petition are palpably incredible, petition properly may be dismissed without affording any evidentiary hearing. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐751

Palpably incredible nature of habeas claim of state capital prisoner, that sentencing jury might have acted differently had it thought defendant guilty of "some" lesser number of unrelated murders that defendant specifically conceded rather than seven unrelated murders to which defendant had confessed and pled guilty, supported dismissal, without evidentiary hearing, of claim that defendant's confession to those prior murders was improperly admitted during sentencing phase of capital murder trial. 28 U.S.C.A. § 2254.

3. Habeas Corpus ⇐847

Any error in denying state capital prisoner evidentiary hearing on habeas claim that sentencing jury was allowed to erroneously believe that he had committed seven unrelated murders to which he confessed, rather than some lesser number which he conceded, was harmless beyond reasonable doubt; jury had before it other evidence to support aggravating factor of prior murder convictions, in form of still another conviction of murder which defendant did not challenge, and additional aggravating factor of murder for hire was not challenged. 28 U.S.C.A. § 2254.

4. Habeas Corpus ⇐481

Any error in trial court's involvement in questioning prosecution witness whose testimony tied defendant to murder or in questioning defense witness was harmless beyond reasonable doubt where, even without prosecution witness' testimony, evidence of defendants' involvement in plot to kill victim was overwhelming; thus, trial was not fundamentally unfair on theory that trial judge's questioning may have led jury to believe that prosecution witness'

theory, not theory of defense witness, was more credible. U.S.C.A. Const.Amend. 14.

5. Criminal Law ⇐655(1)

Trial judge's response, when asked by reporter before conclusion of sentencing phase of capital murder trial whether he thought jury would impose death penalty, of "What can you give a man who has got ten life sentences," although of questionable propriety, did not deprive defendant of fundamentally fair trial; there was no evidence that newspaper was read by any members of sequestered jury or that, by making statement, trial judge allowed arbitrary factors to enter into jury's deliberation. U.S.C.A. Const.Amend. 14.

6. Jury ⇐108

Trial court's refusal to dismiss juror for cause in capital murder prosecution did not violate defendant's Sixth Amendment right to impartial jury where, although juror indicated that he believed defendant should have been sentenced to death upon conviction of unrelated prior murders, juror's voir dire testimony indicated that juror was not irrevocably committed to imposing death penalty in case before court and defendant did not, after challenge for cause was rejected, elect to exercise peremptory challenge against juror. U.S.C.A. Const.Amend. 6.

7. Witnesses ⇐330(1)

Defendant has fundamental right to effective cross-examination on matters bearing on witnesses' credibility. U.S.C.A. Const.Amend. 14.

8. Witnesses ⇐349

Discretionary refusal, in capital murder case involving prison murder, to allow defendant to cross-examine prosecution witness, regarding prosecution witness' attempts to put blame on others for prior murders of which prosecution witness had been convicted, did not deny defendant any federal constitutional right; in light of defendant's use of other ample opportunities to impeach prosecution witness' credibility and overwhelming evidence of defendant's guilt, any abuse of trial court's discretion in limiting cross-examination was harmless beyond reasonable doubt. U.S.C.A. Const. Amend. 14.

9. Criminal Law ⇐1170½(1)

Any improper restriction by trial court on capital murder defendants' direct examination of defense witness was harmless beyond reasonable doubt where evidence, which was excluded on hearsay grounds, was ultimately adduced during cross-examination of same witness.

10. Constitutional Law ⇐268(10)
Witnesses ⇐2(1)

Criminal defendant's right to compel testimony is fundamental to Sixth and Fourteenth Amendment due process rights. U.S.C.A. Const.Amends. 6, 14.

11. Witnesses ⇐308

When witness indicates that he will assert Fifth Amendment privilege, trial judge must make proper and particularized inquiry into legitimacy and scope of witnesses' assertion of privilege; witness may be totally excused only if court finds that witness could legitimately refuse to answer any and all relevant questions. U.S.C.A. Const.Amend. 5.

12. Criminal Law ⇐1170½(1)

Any error in refusing to require witness, who trial court had been informed would assert his Fifth Amendment right not to testify, to assert Fifth Amendment privilege before jury was harmless where witness' testimony would have been merely cumulative; fact that defendant did not elect to offer witness' expected testimony in state postconviction proceeding strongly suggested defendant's own estimate of its slight probative value. U.S.C.A. Const. Amends. 5, 6, 14.

13. Criminal Law ⇐721(1)

In assessing alleged improper comment on defendant's failure to testify, question is whether disputed statements so infected trial and sentencing with unfairness that ultimate conviction and sentence constituted denial of due process. U.S.C.A. Const.Amend. 5.

14. Criminal Law ⇐721(5)

Prosecution's closing argument, in which prosecutor referred to 14 "undisputed" pieces of evidence, did not constitute improper comment on defendant's failure to testify where defendant presumably could have sought testimony of voice and handwriting analysts and other witnesses to dispute cited items. U.S.C.A. Const. Amend. 5.

15. Criminal Law ⇐721(3)

State's argument during sentencing phase of capital murder trial, to effect that defendant had shown no remorse, did not constitute improper comment on defendant's refusal to testify during guilt phase of trial, where comment was directed toward defendant's anticipated speech during sentencing argument and fact that he had shown no remorse for previous murders of which he had been convicted, which had been introduced as aggravating factors. U.S.C.A. Const.Amend. 5.

16. Criminal Law ⇐1172.2

Even where instruction constitutes impermissible burden-shifting, any error in giving it may be found harmless if reviewing court can say beyond reasonable doubt that jury would have found it unnecessary to rely on burden-shifting presumption in order to convict.

17. Criminal Law ⇐1172.2

Instruction which impermissibly shifted burden on issue of malice in homicide prosecution was harmless error, where beyond reasonable doubt jury would have found it unnecessary to rely on presumption; given overwhelming evidence of guilt it was difficult to see how jury could not have concluded, even without presumption, that killing was done with malice.

18. Constitutional Law ⇐268(11)
Criminal Law ⇐789(7)

Substantial doubt portion of reasonable doubt instruction did not rise to level of due process violation where trial judge's use of term "substantial doubt" was, in context of entire instruction, more accurate than when viewed in artificial isolation, was employed in instruction to contrast reasonable doubt with "some imaginary doubt or some slight doubt," and was not likely to mislead jury. U.S.C.A. Const. Amend. 14.

19. Homicide ⇐358(1)

Allowing evidence in penalty phase of capital murder prosecution that prior death sentence that defendant had received in another case had been vacated was not constitutional error on theory that it could have led jury to believe that any death penalty it might impose was advisory only; such evidence did not improperly describe role assigned to jury by local law and most that reasonable jury could have made of evidence was that statute under which jury was to sentence defendant might conceivably be held unconstitutional at later date. U.S.C.A. Const.Amend. 8.

20. Criminal Law ⇐796, 805(3)

Trial court's use over 40 times of words to effect it was jury's responsibility to "recommend" that the court sentence defendant to life imprisonment or death, could not have reasonably led jury to believe that any death penalty it might impose would be advisory only, thereby diminishing jurors' sense of responsibility, where there was no implication anywhere in case that jury's recommendation was nonbinding; however, it would have been wiser for trial court to explicitly instruct jury that word "recommendation" meant binding recommendation. U.S.C.A. Const. Amend. 8.

21. Homicide ⇐358(1)

Allowing testimony concerning defendant's prior vacated death sentence in another homicide case did not introduce arbitrary factors into sentencing decision in capital murder prosecution, even if evidence was of limited, if any, relevance to jury's decision whether to impose death penalty; defendant argued that evidence improperly suggested to jury, that regardless of its determination of whether defendant should be sentenced to death for murder involved in case, jury could properly reimpose earlier death penalty which had been vacated because of legal technicality.

22. Habeas Corpus ⇐379

Habeas petitioner's contention that sympathy instruction given to jury in sentencing phase of capital murder prosecution constituted Eighth Amendment violation by effectively precluding jury from considering relevant mitigating evidence in violation of Eighth Amendment was foreclosed, since any such ruling would constitute "new rule," which could not be announced or applied in habeas case on collateral review. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 8.

23. Homicide ⇐311

Challenged instruction in capital murder case did not impermissibly suggest to sentencing jury that mitigating circumstances must be found beyond reasonable doubt; instruction stated that it was not required for jury to find beyond reasonable doubt existence of at least one alleged statutory mitigating circumstance in order to recommend defendant be given life sentence. U.S.C.A. Const.Amend. 8.

24. Criminal Law ⇐796, 822(1)

Trial court's presumably unintentional statement, to effect that jury had to find at least one or more aggravating circumstances or else it would "have to recommend a death sentence," could not, in context of entire charge, have confused reasonable juror and thus was not constitutional error, where trial court instructions made patently clear that death penalty could not be imposed without aggravating circumstances and that jury had, in any case, full discretion not to impose death sentence, even if aggravating circumstances and no mitigating circumstances were found. U.S.C.A. Const.Amend. 8.

25. Criminal Law ⇐79ℰ

Trial court's misstatement of South Carolina law in capital murder prosecution, by instructing jury to effect that decision to impose life sentence must be unanimous, did not constitute arbitrary factor in sentencing process, rendering unanimous death sentence unreliable, where it was inconceivable that disputed instruction would have caused jurors unanimously to impose death sentence out of fear of mistrial should they not be unanimous in their decision to impose life sentence. U.S.C.A. Const.Amend. 8.

John Henry Blume, III (argued), South Carolina Death Penalty Resource Center, Columbia, S.C., for petitioner-appellant.

Frank Louis Valenta, Jr., Asst. Atty. Gen., Donald J. Zelenka, Chief Deputy Atty. Gen., T. Travis Medlock, Atty. Gen. (on brief), Columbia, S.C., for respondents-appellees.

Before ERVIN, Chief Judge, and PHILLIPS and CHAPMAN, Circuit Judges.

PHILLIPS, Circuit Judge:

Donald Henry Gaskins, a South Carolina prison inmate under sentence of death for capital murder, appeals the district court's denial of an evidentiary hearing and dismissal of his 28 U.S.C. § 2254 petition for failure to show entitlement to federal collateral relief. We affirm.

I

Gaskins' victim, fellow death row inmate Rudolph Tyner, had been sentenced to death for killing a Mr. and Mrs. Moon during a robbery. Tony Cimo, a stepson of the Moons, seeking to avenge the murders, contacted an acquaintance who put him in touch with Gaskins, who was serving ten life sentences, nine for murder and one for burglary. Telephone toll records produced at trial showed that thereafter Gaskins made a number of collect calls either to Cimo or to Cimo's acquaintance who had made the contact. Some of the recorded calls revealed that, after numerous failed attempts to poison Tyner, Gaskins resolved to kill Tyner by means of an explosive device.

Ultimately, Gaskins succeeded. James Arthur Brown, a prisoner assigned to deliver meals to death-row inmates, testified that on the afternoon of the murder, Gaskins asked Brown to deliver a device to Tyner. Brown described the device as a radio-type speaker built into a plastic cup through which, Gaskins led Brown to believe, Tyner could communicate with Gaskins in the adjoining cell rather than having to yell through a common vent. The bottom of the cup had a female-electrical socket adapted for connection to an extension cord. Along with the cup's delivery Brown was to tell Tyner that " 'the wire was in the bottom vent in his cell.' " *See State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132, 136 (1985). Presumably, Tyner then found the wire in the common vent and plugged it into the cup-speaker. The cup exploded, blowing off part of Tyner's head and killing him. Brown testified that after the explosion he went to Gaskins' cell and saw Gaskins pulling a wire from the common vent in his own cell.

Gaskins was convicted and sentenced to death by a jury, and his conviction and sentence were affirmed on direct appeal. *See State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 266 (1985). Efforts to obtain state post-conviction relief were unavailing. *See Gaskins v. State*, No. 85-CP-40-3466, Letter Order (S.C. Jan. 7, 1987), *cert. denied*, 482 U.S. 909, 107 S.Ct. 2491, 96 L.Ed.2d 382 (1987).

This § 2254 petition, raising several claims, followed and was summarily dismissed by the district court. A number of issues and sub-issues are raised on appeal. Of these, one involves the denial of an evidentiary hearing respecting the admission in evidence at sentencing of an earlier confession to other murders, one involves a claimed denial of due process by virtue of trial judge bias, two involve alleged constitutional violations in jury selection, three involve trial court evidentiary rulings allegedly impacting on the trial's fundamental fairness, one involves prosecutorial misconduct, two involve guilt-phase jury instructions, and five involve alleged errors during the trial's sentencing phase.

We address each of these in turn.

1. *Cf. United States v. Jones*, 907 F.2d 456, 460–69 (4th Cir.1990), and *id.* at 470–84 (dissenting opinion) (conflicting views on constitutional power of federal sentencing court to entertain collateral challenge to validity of prior state court conviction invoked for sentence enhancement purposes).

II

Gaskins contends that he was erroneously denied an evidentiary hearing to establish his claim that portions of a confession given by him in connection with an earlier, bargained plea of guilty to several unrelated murders were unconstitutionally admitted at the sentencing phase of his Tyner murder trial.

The district court summarily dismissed this invalid-use-of-confession claim on the stated basis that "[t]here is no reason, and no precedent, for arguing the confession's invalidity for the first time during the sentencing phase of a trial for a subsequent crime five years later ... [rather than] in a collateral proceeding directed at those prior crimes." On this appeal, the parties have joined issue on this threshold question of the habeas court's power to entertain this claim. Because it is a difficult issue with broad and unclear implications,[1] and because there is an alternative basis for upholding the summary dismissal, we decline to rest decision upon the district court's stated basis for dismissing the claim.

To address the alternative basis, it is necessary first to identify the exact nature of Gaskins' constitutional claim. We take it to be that because the earlier confession was coerced, hence involuntarily given, hence unconstitutionally obtained, its use in evidence in the sentencing phase of the later Tyner trial violated Gaskins' eighth amendment right to a "reliab[le] ... determination that death is the appropriate punishment." *Johnson v. Mississippi*, 486 U.S. 578, 584, 108 S.Ct. 1981, 1986, 100 L.Ed.2d 575 (1988) (death penalty predicated in part on prior conviction vacated because coerced confession violates eighth amendment) (quoting *Gardner v. Florida*, 430 U.S. 349, 363–64, 97 S.Ct. 1197, 1207–08, 51 L.Ed.2d 393 (1977)).

The claim is rested on the undisputed fact that at Gaskins' sentencing hearing, a state solicitor was allowed, over Gaskins' timely objection, to read portions of the

earlier confession in which Gaskins had admitted committing seven other murders. Though in personally arguing his case to the sentencing jury Gaskins specifically conceded that, "I'm guilty of some of [the murders], yes. I do not deny that," J.A. at 593, his contention apparently now is that he was coerced into confessing to more than he later conceded to the sentencing jury. From this, the argument runs that the sentencing jury's determination could be shown to be constitutionally unreliable if, as he claimed but was not allowed to establish by evidence, the jury thought him guilty of all the seven murders rather than the "some" lesser number that he specifically conceded. Given this possibility, Gaskins contends that the district court erred in failing to give him an evidentiary hearing to attempt to establish his claim of constitutional unreliability.

[1, 2] This argument fails because of the claim's facial lack of merit. Where the allegations in a habeas petition are palpably incredible, the petition properly may be dismissed without affording any evidentiary hearing. *See Blackledge v. Allison*, 431 U.S. 63, 75–76, 97 S.Ct. 1621, 1629–30, 52 L.Ed.2d 136 (1977). Here the ultimate allegation, on which habeas relief depended, was that the sentencing jury's misperception of the exact number of unrelated murders that Gaskins had committed made its imposition of the death penalty constitutionally unreliable. Under the circumstances, the district court properly could have viewed this as an allegation incredible on its face, and on that basis summarily dismissed the claim. Even assuming the truth of the predicate allegation—that the earlier confession had admitted more murders than Gaskins actually had committed—it defies belief that a jury to which he had just renewed his confession to at least an indefinite "some" of the *seven* earlier confessed would have acted differently (more reliably) had it been aware of the exact mathematical disparity between those actually committed and those confessed.

[3] We might also affirm the summary dismissal of this claim on the alternative basis of a roughly parallel harmless error analysis. *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (harmless error analysis appropriate in review of capital sentencing proceeding). Here the record shows that the state sentencing jury found two aggravating factors: prior murder convictions and murder for hire. It also reveals that the jury had before it, in addition to the earlier confessed murders, still another prior conviction of murder by jury verdict. Both this latter conviction and the murder-for-hire finding stand unchallenged.[2] As earlier indicated, the most favorable result that could be achieved by an evidentiary hearing to challenge the sentencing jury's finding of prior murders as an aggravator would be a demonstration that the jury erroneously believed that Gaskins had committed seven confessed murders, when he had only committed "some" number less than that. When it is recalled that the jury also had before it still another unchallenged murder conviction by jury trial, it is obvious that any error in denying an evidentiary hearing with such a limited potential was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

III

[4] We next consider the district court's dismissal of Gaskins' claim that the state trial judge's demonstrated bias and lack of impartiality made his state trial fundamentally unfair and therefore violated his constitutional right to due process.

2. The parties do not raise and we therefore do not address the possible bearing on this point of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (where capital sentencing jurors have found two aggravators, invalidation of one on review does not require vacating death sentence), and *Smith v. Procunier*, 769 F.2d 170 (4th Cir.1985), *aff'd on other grounds*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (constitutional invalidity of one finding of aggravating factor does not require vacating death penalty where another aggravator is unchallenged).

fourteenth amendment due process requires, at a minimum, an impartial judge and jury. *See Anderson v. Warden, Md. Penitentiary*, 696 F.2d 296, 299 (4th Cir. 1982). Gaskins makes a number of arguments supporting his contention that the state trial judge demonstrably was lacking in the requisite degree of impartiality to ensure due process. First, he points to twenty-two instances where the state trial judge allegedly improperly questioned witnesses. Second, he points to a newspaper article published after the guilt phase of Gaskins' trial, but before sentencing, in which the trial judge, in response to a reporter's question whether the judge thought Gaskins would receive the death penalty, replied, "what can you give a man who has got ten life sentences."

We are persuaded upon a careful review of the record that the judge's conduct did not deny Gaskins a constitutionally fair trial.

Of the twenty-two alleged instances where the trial judge questioned witnesses, Gaskins asserts the following as examples the most "egregious" demonstrations of impermissible bias. These occurred during the questioning of state's witness James Brown and Gaskins' chief rebuttal witness to Brown's testimony, John Caison.

It will be recalled that Brown was the inmate who, allegedly at Gaskins' behest, actually delivered the bomb to Tyner, and who testified to that effect at trial. The allegedly prejudicial conduct occurred when the state attempted to introduce through Brown certain incriminating letters that Gaskins had given Brown. After Brown testified that Gaskins had given him the letters, but before the letters were introduced, the trial judge conducted a hearing outside the hearing of the jury to determine the letters' admissibility. When the jury returned, the trial judge, even though Brown had already testified to the source of the letters, asked Brown to "reiterate where he got the documents from for the jury." J.A. at 214.

During Brown's cross-examination, Gaskins attempted to establish that the letters were not incriminating. After sustaining an objection to a question concerning the intent of a phrase in the letter, the trial judge asked Brown directly what the letters meant to him. When Brown responded that they meant that Gaskins was trying to talk Brown into "taking the rap for it," the trial judge commented, "[t]hat's right. That's what he thought." J.A. at 269.

During the state's cross-examination of Gaskins' rebuttal witness, John Caison, Caison testified that Brown told Caison that Brown and others were plotting to get Tyner. When Caison testified that Brown did not reveal other members of the plot, the following colloquy occurred between the trial judge and Caison:

THE COURT: You didn't ask [Brown who the other members of the plot were?]

CAISON: No, he said ...

THE COURT: It's such a big event, weren't you curious?

CAISON: What he told me, he said ...

THE COURT: Tell the truth now. Did you ask him?

CAISON: I asked him what it was about.

THE COURT: Did he tell you?

CAISON: No sir, he ...

THE COURT: He wouldn't tell you?

CAISON: He told me the less that I knew the better off I was.

THE COURT: He delivered the explosives for somebody else?

CAISON: I guess so. He didn't tell me that.

THE COURT: He didn't tell you that. Tell the jury what he told you?

J.A. at 336–37.

Later, after Caison's redirect testimony concerning Brown's alleged involvement in an earlier attempt to poison Tyner, the trial judge again engaged in a colloquy with Caison:

MR. SWERLING: Who told you not to go on Death Row [the day Tyner was killed]?

CAISON: James Brown.

* * * * * *

THE COURT: Why did he tell you that?

CAISON: He didn't want me to go on there to know about nothing. He wanted me to stay away from death row.
THE COURT: All right. What did he have against Rudolph Tyner? Why did he want to kill him?
CAISON: For the money.

* * * * * *

THE COURT: [Where did the money come from?]

* * * * * *

CAISON: I don't know. He didn't say.
THE COURT: And you didn't ask?
CAISON: He wouldn't have told me anyhow.

* * * * * *

THE COURT: Why didn't you ask him who paid him money?

* * * * * *

CAISON: Well, when somebody don't want to answer your question, you best leave them alone.

J.A. 343–47.

Gaskins argues that the trial judge's engagement with Brown and Caison reflected to the jury that Brown's theory, and not Caison's theory, was credible. This, argues Gaskins, rendered the trial fundamentally unfair, especially when coupled with the following accessory-before-the-fact jury instruction:

> [Y]ou must be convinced as I told you that the Defendant here aided, counseled, or otherwise procured James Brown to commit the murder of Rudolph Tyner and that the Defendant was not present either actually or constructively.

J.A. 446. The instruction, argues Gaskins, simply incorporated the state's theory of the offense into the charge.

Although these various instances of involvement by the trial judge might, in isolation, have damaged Gaskins' ability to discredit Brown's testimony, taken in the context of the entire trial, the trial judge's involvement did not render the trial fundamentally unfair. The record evidence of Gaskins' involvement in the plot to kill Tyner, even without Brown's testimony, was overwhelming. We therefore hold that any error in the trial court's involvement was harmless beyond a reasonable doubt. *See Anderson*, 696 F.2d at 299. Moreover, we fail to understand how the disputed jury instruction was in any way erroneous and we are directed to no case law to that effect. On the evidence of record, this was a proper instruction concerning what the jury had to find before it could convict Gaskins of murder or accessory before the fact to murder.

[5] Finally, respecting the trial judge's alleged statement to the newspaper, although we seriously question the propriety of such a statement if actually made, there is no evidence that the newspaper was read by any members of the sequestered jury or that by making the statement the trial judge allowed arbitrary factors to enter into the jury's deliberation. The judge himself did not of course decide the sentence to be imposed.

We therefore affirm the district court's rejection of the claim of a denial of due process by virtue of the trial judge's lack of impartiality.

IV

[6] We next consider related claims respecting the jury selection process.

Of ten peremptory challenges available to Gaskins, three were exercised to exclude jurors Rhyne, Richardson, and Cecil. Gaskins argues that, for various reasons, the trial court erroneously refused to excuse these jurors for cause. Of the jurors who did sit, Gaskins argues that the trial court erroneously refused to excuse juror Doster for cause.

Gaskins rightly makes no claim that requiring him to use peremptory challenges to exclude jurors Rhyne, Richardson, and Cecil violated his fourteenth amendment right to due process by arbitrarily depriving him of the full complement of peremptory challenges allowed by South Carolina law. *See Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). The crux of Gaskins' claim in this regard is that he was denied his sixth amendment right to an impartial jury.

"Any claim that the jury was not impartial ... must focus ... on the jurors who actually sat" and cannot be established simply by showing the loss of a peremptory challenge. *Id.* at 86, 108 S.Ct. at 2277. Accordingly, we examine Gaskins' claim in light of the jurors who actually sat.

Of the jurors who actually sat, Gaskins only challenges the impartiality of juror Doster, whom Gaskins unsuccessfully challenged for cause but did not then challenge peremptorily. Doster admitted on *voir dire* that his "honest opinion is that [Gaskins] was found guilty, convicted of those earlier murders, [and] he should have been executed at that time." J.A. 110. Moreover, upon questioning by the trial court, Doster stated that, if Gaskins were found guilty of Tyner's murder, and that if it were shown that Gaskins had murdered before, Doster would be predisposed to impose a death penalty. Though he concedes that Doster was capable of impartially determining guilt or innocence, Gaskins contends that Doster should have been excused for cause because Doster's ability to consider a life sentence would be substantially impaired by his belief that Gaskins should have received the death penalty for the previous murders.

While it may be true that Doster was predisposed in favor of the death penalty, we find no constitutional error in the trial court's refusal to exclude him. First, it is important to note that Gaskins elected not to use an available peremptory challenge to remove Doster. Though not dispositive, this is some indication that, at the time, the trial judge and Gaskins, both of whom had opportunity to observe Doster's demeanor, felt that Doster would act impartially. The controlling principle here is that "the most that can be demanded of a venireman ... is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed." *Witherspoon v. Illinois*, 391 U.S. 510, 522 n. 21, 88 S.Ct. 1770, 1777 n. 21, 20 L.Ed.2d 776 (1968) (emphasis in original). Our examination of Doster's *voir dire* testimony convinces us that the district judge did not err in concluding that he was not irrevocably committed. At numerous times during questioning, Doster stated that he could give a life sentence, even in the presence of aggravating circumstances. Doster stated that, though he could not with certainty say that the prior conviction would not affect his thoughts on sentencing, when it came time actually to impose the death sentence, he did not know how he would vote. Under the circumstances, we cannot say that Doster's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980).

Accordingly, we agree with the district court that the trial court's refusal to dismiss Doster for cause did not violate Gaskins' sixth amendment right to an impartial jury.

V

During the course of the trial, the trial court made three evidentiary rulings which, Gaskins argues, rendered his trial fundamentally unfair. The first involved Gaskins' cross-examination of James Brown; the second involved Gaskins' direct examination of John Caison; the third involved allowing a material witness to assert the fifth amendment.

During cross-examination of Brown, Gaskins sought to discredit Brown with questions concerning Brown's attempts to blame on others the two prior murders of which he had been convicted. This evidence, argues Gaskins, constituted not only an attack on Brown's credibility, but would also have buttressed Gaskins' theory that Brown, not Gaskins, had conceived and executed Tyner's murder. The trial court excluded this evidence based upon the general South Carolina rule that only the fact of a conviction of a crime of moral turpitude is admissible. On appeal, the South Carolina Supreme Court held that, to the extent the trial court's ruling was erroneous, such error was harmless. *See Gaskins*, 326 S.E.2d at 139–40. We agree.

[7, 8] Absent "circumstances impugning fundamental fairness or infringing spe-

cific constitutional protections," admissibility of evidence does not present a federal question. *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir.1960). Nevertheless, the defendant has a fundamental right to effective cross-examination on matters bearing on the witness' credibility. *See Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). We agree with the district court that the trial judge's discretionary refusal to allow this particular line of cross-examination did not deny any federal constitutional right, if indeed it constituted an abuse of discretion under state law.

Although Gaskins was not permitted to elicit from Brown the circumstances surrounding his other convictions, Gaskins availed himself of ample opportunities to discredit Brown's testimony. For example, during cross-examination, Brown revealed that, contrary to his trial testimony, he had initially told investigators that he and Gaskins had run together to Tyner's cell after the explosion. J.A. at 225. On further cross-examination, Brown admitted that he had revealed nothing to investigators about the speaker-cup bomb, and that when he finally did give his present version of the Tyner murder to the prosecutor, he did so from fear of being charged himself. J.A. at 232. In light of ample opportunities to impeach Brown's credibility, and in light of the overwhelming evidence of Gaskins' guilt, any abuse of the trial court's discretion on this score was harmless beyond a reasonable doubt.

[9] Similarly, any improper restriction on Gaskins' direct examination of John Caison was harmless beyond a reasonable doubt. On direct examination, James Brown stated that he had never admitted to Caison having attempted to poison Tyner. On direct examination of Caison, Gaskins attempted to elicit testimony to the effect that Brown had admitted attempting to poison Tyner and that, on the day of the explosion, Brown had told Caison to stay away from death row. The trial court excluded these statements as inadmissible hearsay. J.A. at 298–301. Even so, during cross-examination, Caison testified that "James Brown told me that they were plotting to get [Tyner]," and that Brown told Caison "not to be on death row on Sunday." J.A. at 336–37. The information allegedly excluded was therefore ultimately adduced during cross-examination, rendering any error by the trial court in excluding it harmless beyond reasonable doubt. *See Grundler*, 283 F.2d at 802.

Gaskins' final challenge to the state trial court's evidentiary rulings involves the court's refusal, after being informed that witness William Cole would assert his fifth amendment privilege against self-incrimination if forced to testify, to require Cole to take the stand and assert the privilege in open court. Out of the jury's hearing, the trial court determined that the crux of Cole's testimony would be that, after the explosion, Gaskins went, not to his cell as Brown had testified, but down to the site of the explosion. *See Gaskins*, 326 S.E.2d at 140.

[10, 11] A criminal defendant's right to compel testimony is fundamental to sixth and fourteenth amendment due process rights. *See United States v. Goodwin*, 625 F.2d 693, 703–04 (5th Cir.1980). When a witness indicates that he will assert the fifth amendment privilege, the trial judge must make a proper and particularized inquiry into the legitimacy and scope of the witness' assertion of the privilege. *See id.* at 701. A witness may be totally excused only if the court finds that he could legitimately refuse to answer any and all relevant questions. *See id.*

[12] On this point we agree with the South Carolina Supreme Court that the trial court's refusal to require Cole to assert his fifth amendment privilege before the jury was in any event harmless error. First off, as the South Carolina Supreme Court concluded, Cole's testimony would have been merely cumulative. *See Gaskins*, 326 S.E.2d at 140. Moreover, the fact that Gaskins did not elect to offer Cole's expected testimony in the state post-conviction proceeding strongly suggests his own estimate of its slight probative value. Any error in refusing to require Cole to take the stand was harmless beyond a reasonable doubt.

VI

Gaskins' next claim involves alleged prosecutorial misconduct.

During the state's closing argument at the guilt phase of Gaskins' trial, the solicitor stated that he wished to talk to the jury "about what is not in dispute in this case." J.A. at 367. The solicitor then proceeded to list fourteen so-called "undisputed" pieces of evidence, eight of which, Gaskins argues, only Gaskins could have disputed. Additionally, during the sentencing phase of Gaskins' trial, the prosecutor stated that "Mr. Gaskins has shown no remorse. No emotion. He has shown you nothing." J.A. at 577. Gaskins did not object to these statements at trial, but argued on both direct appeal and collateral review that these statements constituted violations of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (improper comment on defendant's failure to testify).

[13, 14] In assessing an alleged *Doyle* violation, the question is whether the disputed statement so infected the trial and sentencing with unfairness that the ultimate conviction and sentence constituted a denial of due process. *See Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The eight "undisputed" pieces of evidence are: (1) tapes of Gaskins' conversations with Jack Martin (the intermediary through whom Cimo contacted Gaskins in prison); (2) identities of the voices on the Martin–Gaskins tapes; (3) the dates when the conversations occurred; (4) the exhibit showing when Cimo and Gaskins conversed; (5) Gaskins' voice on a statement given to an investigator; (6) two inculpatory letters written from Gaskins to Brown; (7) a letter written from Gaskins to Lee exculpating Lee; and (8) that electronic equipment, a soldering iron, speakers, and radios were found in Gaskins' cell.

As the magistrate's recommendation, adopted by the district court, correctly notes, Gaskins presumably could have brought the testimony of voice and handwriting analysts to contradict items 1–7, and any number of inmates could have testified to the items Gaskins kept in his cell before Tyner's murder. We agree with the district court that, under these circumstances, the prosecutor's "laundry list" argument did not constitute a *Doyle* violation.

[15] Likewise, the state's argument during sentencing to the effect that Gaskins has shown no remorse must be viewed in context. The solicitor stated that:

> Mr. Gaskins has announced to the Court that he is going to make a speech to you as well. I want Mr. Gaskins when he comes up to tell you what in his character caused him to murder each of these people, what caused him to murder Dennis Bellamy? What caused him to shoot this 15 year old, Johnny Knight, in the back of the head?
>
> . . . . . .
>
> Mr. Gaskins has shown no remorse. No emotion. He has shown you nothing.
>
> . . . . . .
>
> Mr. [Gaskins] is going to speak to you at this time . . . and I ask you to listen to [him] as you listened to me.

J.A. 576–77. Under no reasonable view can the solicitor's statement be construed to constitute an improper comment on Gaskins' refusal to testify at the guilt phase of his trial.

VII

Gaskins asserts the following two errors in the trial court's guilt-phase jury instructions: (1) the trial court's charge regarding presumed malice constituted an impermissible burden-shifting instruction; and (2) the trial court's reasonable doubt instruction impermissibly lessened the state's burden of proof.

As part of the jury charge, the trial court instructed the jury that "while malice is presumed from the use of a deadly weapon or from a dangerous instrument . . . where circumstances relating and surrounding the incident are brought out, then the presumption vanishes and malice again must be proven to you beyond a reasonable doubt."

J.A. at 442. On direct appeal, the South Carolina Supreme Court held that, although the instruction constituted impermissible burden-shifting, the constitutional error was harmless beyond a reasonable doubt. *See Gaskins*, 326 S.E.2d at 143. Both the magistrate and the district court agreed with the state supreme court. J.A. 1186; 1326–27. We also agree.

[16] Even where an instruction constitutes impermissible burden-shifting, any error in giving it may be found harmless if the reviewing court can say beyond reasonable doubt that the jury would have found it unnecessary to rely on the burden-shifting presumption in order to convict. *See Rose v. Clark*, 478 U.S. 570, 583, 106 S.Ct. 3101, 3109, 92 L.Ed.2d 460 (1986).

[17] Here, the jury necessarily found by its guilty verdict that Gaskins had murdered Tyner with a bomb Gaskins had built from electronic components in his cell and a piece of dynamite he received in the mail, so it is difficult to see how the jury could not have concluded, even without the presumption, that the killing was done "with malice." Aside from the raw circumstances of the killing, transcripts of conversations between Gaskins and Jack Martin (the intermediary who procured Tyner's murder) constitute further overwhelming evidence of malice.[3] We therefore can say " 'beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.' " *Id.*

[18] Gaskins next asserts that the trial court's definition of reasonable doubt for the jury as "a doubt for which you can give a reason[,] [i]t is a substantial doubt," J.A. at 439, relieved the prosecution of proving every element of the crime beyond reasonable doubt as required by *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

An instruction equating reasonable doubt with " 'a substantial doubt, a real doubt' ... although perhaps not in itself reversible error, often has been criticized as confusing." *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978). At some point, a reasonable doubt definition may be so incomprehensible or potentially prejudicial that it requires reversal. *See United States v. Moss*, 756 F.2d 329, 333 (4th Cir.1985). Nevertheless, the question in a collateral proceeding such as this is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether 'the instruction is undesirable, erroneous or even universally condemned.' " *Smith v. Bordenkircher*, 718 F.2d 1273, 1276 (4th Cir.1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977) (citations omitted)).

Viewed in the context of the entire record of trial, the substantial-doubt portion of the instruction did not rise to the level of a due process violation. First, the trial court employed the instruction to set in contrast "some imaginary doubt or some slight doubt or some fanciful doubt that you might have." J.A. at 439. The trial judge's use of the term substantial doubt was, in context of the entire instruction, more accurate than when viewed in artificial isolation, and was not "likely to 'mislead the jury into finding no reasonable doubt when in fact there was some.' " *Smith v. Bordenkircher*, 718 F.2d at 1277. Moreover, the trial court flatly instructed the jury that "the proof offered by the state must exclude every other reasonable hypothesis except the guilt of the accused and must satisfy you beyond a reasonable doubt." J.A. at 444. This instruction further neutralized any negative effects of the substantial-doubt instruction. *See Bordenkircher*, 718 F.2d at 1277.

3. Some examples of conversations appear in the record:

> When he plugs that son of a bitch up, it'll blow him on into hell.... Dam [sic] if I can't fix him up.
>
> Get me enough to do that damn job and listen for the bang.
>
> That's enough [drug] to bust his heart.
>
> The next night after I get [the poison] ... that son of a bitch'll be laid out.
>
> That's a hell of a hard nigger to get rid of.

J.A. 1185.

We are not prepared to say that this instruction, even in combination with the substantial doubt instruction, "so infected the entire trial that the resulting conviction violates due process." *Id.* at 1276.

VIII

[19] Gaskins argues that allowing evidence that a prior death sentence of Gaskins had been vacated could have led the jury to believe that any death penalty it imposed was advisory only, thereby diminishing the jurors' sense of responsibility for death-penalty imposition in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (eighth amendment violation to tell jury that Mississippi Supreme Court would review any death sentence).[4]

"[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328–29, 105 S.Ct. at 2639–40. Nevertheless, "if the challenged instructions accurately described the role of the jury under state law, there is no basis for a *Caldwell* claim. To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989).

The asserted *Caldwell* violation occurred when, during the penalty phase of the trial, the state introduced evidence of Gaskins' previously vacated murder conviction.[5] And it is argued that this *Caldwell* violation was aggravated by the trial court's use over 40 times of words to the effect that "you will *recommend* that the court sentence the defendant to life imprisonment [or] death." J.A. 610 (emphasis added).

Even taken together, we conclude that this evidence and the judge's statement "had no effect on the sentencing decision." *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646. First, Gaskins points to no references by the state or the trial judge concerning death-sentence review. We do not believe that evidence concerning a prior vacated death sentence "improperly described the role assigned to the jury by local law." *Dugger*, 109 S.Ct. at 1215. The most that a reasonable jury could have made of this evidence was that the statute under which the jury was to sentence Gaskins might conceivably be invalidated as unconstitutional at some future date. Nowhere was there any suggestion that such invalidation was imminent or even contemplated.

[20] Similarly, even taken together with the prior-death-sentence evidence, it is difficult to see how, in context, the trial judge's use of the word "recommend" could have had an effect on the sentencing decision. In an exhaustive analysis, the facts of which are not disputed here, the magistrate noted that during *voir dire*, the trial judge, the solicitor and Gaskins' attorney repeatedly told each juror that the jury could sentence to death or life imprisonment, that the jury had to make the decision, and that "the jury will be asked to decide his punishment, either life imprisonment or death by electrocution." Moreover, in each case Gaskins cites finding a *Caldwell* violation, the suggestion to the jury that its decision was merely advisory was explicit and obvious. Nowhere in this case did anyone even imply that the jury's recommendation was non-binding. Though, in retrospect, we believe a wiser course would have been for the trial judge to explicitly instruct the jury that the word "recommendation" meant "binding recommendation," under the circumstances, we are satisfied that the jury was properly aware of its sentencing responsibilities.

4. Because this claim is closely related to Gaskins' claim that the trial judge's sentencing-phase instructions exacerbated the *Caldwell* violation, both will be dealt with in this section of the opinion.

5. The sentence was vacated when the South Carolina Supreme Court declared South Carolina's death penalty statute unconstitutional.

[21] Gaskins also contends that, even if there was no *Caldwell* violation, allowing testimony concerning the prior-vacated death sentence introduced arbitrary factors in the sentencing decision in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Gaskins argues that this testimony implied that, regardless of whether Gaskins should be sentenced to death for Tyner's murder, the jury could properly reimpose the earlier death penalty which was, after all, only vacated because of a legal technicality. Although we agree that evidence of a prior-vacated death penalty is of limited, if any, relevance to the jury's decision whether to impose the death penalty, it is simply not a consideration so "constitutionally impermissible or totally irrelevant to the sentencing process," *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983), as to rise to the level of a violation of *Booth*.

IX

Gaskins' final assignments of error concern the trial judge's instructions to the sentencing jury to the following effect: (1) that the jury could not allow itself to be governed by sympathy; (2) that mitigating circumstances must be found beyond a reasonable doubt; (3) that the decision to impose a life sentence must be unanimous.

[22] At the sentencing hearing, the trial court instructed the jury not to allow itself to be governed by sympathy:

> You cannot allow yourselves to be governed by sympathy, by prejudice, or by passion or by public opinion. Both the state and the defendant have the right to expect that each of you will carefully and impartially consider all of the evidence in this case....

J.A. at 619. Gaskins argues that this instruction, coupled with the prosecutor's statements to the effect that Gaskins was asking for, but deserved, no mercy, constituted an eighth amendment violation because it effectively precluded the jury from considering relevant mitigating evidence offered by Gaskins, namely his individualized appeal for compassion, understanding and mercy. *See, e.g., Caldwell*, 472 U.S. at 330–31, 105 S.Ct. at 2640–41; *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976).

Our consideration of this issue is foreclosed by the Supreme Court's recent decision in *Saffle v. Parks*, — U.S. —, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). *Parks*, considering the eighth amendment ramifications of a sympathy instruction in all material respects identical to the charge given in Gaskins' case,[6] held that to uphold such a claim would be to adopt a "new rule" under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), that did not fall within *Teague*'s two exceptions. Accordingly, the proposed rule could not be announced or applied in a habeas case on collateral review. *Parks*, 110 S.Ct. at 1263–64. *Parks* dictates a similar rejection of Gaskins' claim here.

[23] Gaskins next asserts that the following charge, because it used the term "reasonable doubt" so close to the term "mitigating circumstance," impermissibly suggested to the sentencing jury that mitigating circumstances must be found beyond reasonable doubt in contravention of the eighth amendment:

> Before you can recommend the imposition of a life sentence, it is not necessary and I repeat, *it is not necessary for you to find beyond a reasonable doubt the existence of any alleged statutory mitigating circumstances* or any other mitigating circumstance,
>
> While it is necessary for you to find beyond a reasonable doubt the existence of at least one alleged statutory aggravating circumstance before you can recommend that the defendant be sentenced to death, it is not—*it is not required that you find beyond a reasonable doubt the existence of at least one alleged statutory mitigating circumstance in order to recommend that the defendant be given a life sentence.* As a matter of fact, *you may recommend that the defendant receive a life sentence irrespective of whether you find the existence in the evidence of an alleged statutory mitigating circumstance or not; but where you consider an alleged statutory mitigating circumstance, it is proper for you to consider only a statutory mitigating circumstance that is supported by the evidence.*

J.A. 614–15 (emphasis added). We disagree. Gaskins' strained interpretation of the trial court's jury instruction is simply not supported by its language, and does not warrant finding an eighth amendment violation.

[24] Similarly, the trial court's statement to the effect that "you have to find at least one or more aggravating circumstances or else you will have to recommend a death sentence [presumably the trial court meant to say life imprisonment instead of death sentence]," could not, in the context of the entire charge, have confused a reasonable juror. As the South Carolina Supreme Court stated, the trial court instructions made patently clear that: (1) a death penalty could not be imposed without aggravating circumstances; (2) if statutory or non-statutory mitigating circumstances were found, a life sentence would be appropriate; (3) the jury had, in any case, full discretion not to impose the death sentence, even though aggravating circumstances and no mitigating circumstances were found. *See Gaskins*, 326 S.E.2d at 146.

[25] Gaskins' final asserted error in the jury charge concerned the trial court's erroneous instruction to the effect that the decision to impose a life sentence must be unanimous. Gaskins contends that this incorrect instruction effectively communicated to the jury that if all members of the jury did not agree on Gaskins' sentence, then a mistrial would ensue. Thus, the erroneous instruction constituted an arbitrary factor into the sentencing, rendering the unanimous death sentence unreliable. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

We disagree. Although the trial court inadvertently misstated South Carolina law, it is inconceivable that the disputed instruction could have caused the jurors unanimously to impose a death sentence out of fear of mistrial should they not be unanimous in their decision to impose life imprisonment. We are satisfied that this improper instruction, viewed in context of the entire jury charge, could have had no effect on the sentencing decision. *See Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

X

For the foregoing reasons, we affirm the district court's dismissal of Gaskins' habeas corpus petition.

AFFIRMED.

6. The challenged instruction in *Parks* stated that:

> You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duty as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

Parks v. Brown, 860 F.2d 1545, 1552 n. 8 (10th Cir.1988), *reversed*, — U.S. —, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

ESTATE OF William L. RENO, Jr.; Barbara G. Reno, Executrix, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 89-2078.

United States Court of Appeals, Fourth Circuit.

Argued Oct. 30, 1989.

Decided Oct. 19, 1990.

Estate filed petition in tax court seeking redetermination of assessed deficiency. The United States Tax Court, Lawrence A.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 16, 1990

No. 89-4011

DONALD HENRY GASKINS

Petitioner - Appellant

v.

KENNETH D. MCKELLAR, Warden, Central Correctional Institution; ATTORNEY GENERAL OF SOUTH CAROLINA, T. Travis Medlock

Respondents - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Chief Judge Ervin and Judge Chapman.

For the Court,

JOHN M. GREACEN
CLERK

ORIGINAL

IN THE SUPREME COURT
OF THE UNITED STATES

No. 90-7469

October Term, 1990

DONALD HENRY GASKINS,

Petitioner,

versus

KENNETH D. MCKELLAR, WARDEN,
SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS, AND THE
ATTORNEY GENERAL OF SOUTH
CAROLINA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITIONER'S QUESTIONS PRESENTED

1. Did this Court's per curiam decision in Cage v. Louisiana, which disapproved of reasonable doubt instructions materially identical to those given in this case, announce a "new rule" of criminal procedure inapplicable in a habeas corpus proceeding?

2. Whether the definition of "reasonable doubt" employed by the trial court during his charge lessened the state's burden of proof in violation of the Fourteenth Amendment and the due process principles of In re Winship and Cage v. Louisiana?

3. Whether the state's admission of evidence that petitioner had previously been sentenced to death, and information regarding other plea bargains petitioner had entered into, coupled with the trial court's jury instructions, violated the Eighth and Fourteenth Amendments?

4. Whether a constitutionally impermissible burden shifting instruction regarding implied malice was harmless beyond a reasonable doubt?

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IN THE SUPREME COURT
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DONALD HENRY GASKINS,

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KENNETH D. McKELLAR, WARDEN, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Respondents hereby make a Brief in Opposition to the Petition for a Writ of Certiorari requesting this Court to deny the writ. The Respondents would respectfully show this Court the following:

CITATION TO OPINIONS BELOW

Petitioner was convicted of murder and subsequently sentenced to death on March 26, 1983. The convictions and sentence were affirmed on direct appeal by the South Carolina Supreme Court. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120 (1985).

Petitioner filed an Application for Post Conviction Relief in the Richland County, South Carolina, Court of Common Pleas on August 6, 1985. J.A.[1] 651. An evidentiary hearing was held on March 21, 1986, and relief was denied on June 6, 1986. J.A. 723-876; 878. The South Carolina Supreme Court denied Petitioner's Petition for Writ of Certiorari on January 7, 1987, as did the United States Supreme Court. Gaskins v. South Carolina, 482 U.S. 909 (1987).

A Petition for a Writ of Habeas Corpus was filed in the United States District Court for the District of South Carolina on August 11, 1987. The District Court referred the case to Magistrate Charles W. Gambrell, who, on January 27, 1989, recommended that the District Court dismiss the Petition. J.A. 1070-1200. The District Court entered summary judgment for the Respondents on August 2, 1989. J.A. 1312-1330. Petitioner filed a Motion to Alter or Amend the Judgment, pursuant to F.R.C.P. 59(e), on August 11, 1989. J.A. 1332. The Motion was denied on August 28, 1989. J.A. 1350. Petitioner filed a timely Notice of Appeal on September 26, 1989. J.A. 1367. The District Court granted a Certificate of Probable Cause to Appeal on October 2, 1989. On October 15, 1990, the District Court's Order was affirmed by the United States Court of Appeals for the Fourth Circuit. Gaskins v. McKellar, 916 F.2d 941 (4th Cir. 1990). Petitioner's Application for Rehearing with

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[1] "J.A." refers to the joint appendix filed in the United States Court of Appeals for the Fourth Circuit in connection with petitioner's appeal.

Suggestion for Rehearing En Banc was denied by the Fourth Circuit on November 16, 1990.

JURISDICTION

The Order of the United States Court of Appeals for the Fourth Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc was entered November 16, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3), Petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's case involves the Eighth Amendment to the United States Constitution which reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves Section One of the Fourteenth Amendment which states in part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Donald Henry Gaskins, whose nickname is "Pee Wee," was serving ten life sentences, nine for murder and one for burglary, when he was charged with the murder of a fellow prisoner, Rudolph Tyner, on Sunday, September 12, 1982. Tyner had been sentenced to die for killing a Mr. and Mrs. Moon after Tyner and an accomplice

robbed their store on March 18, 1978. When Tyner was killed (by an explosion which went off in his cell around 4:45 P.M., on the day he was injured), he was housed in what prison officials and inmates referred to in the records as "death row," which was located in a building named Cell Block Two ("CB-2") which itself was located inside Central Correctional Institution ("CCI") of the South Carolina Department of Corrections ("SCDC") in Columbia. In addition to housing death row inmates such as Tyner, CB-2 also contained inmates detained for mental evaluations, inmates serving administrative sentences for disciplinary violations, inmates in segregated confinement who were under investigation, and inmates in protective custody. Despite his ten life sentences, Petitioner Gaskins was not detained all day in a locked cell (except when locked with his own padlock), for he was assigned as "the building man" to make electrical repairs, appliance repairs (television sets and radios), plumbing repairs, and whatever other maintenance jobs that lay within his particular expertise. As the building man, Gaskins had pretty much of a free run of CB-2 from early each morning until evening lock-down occurred after the evening meal had been served and dirty food trays had been taken out of the building.

Mr. and Mrs. Moon, Rudolph Tyner's murder victims, were survived by a daughter and a stepson, Tony Cimo. Cimo, who lived in or near Horry County (well over a hundred miles

from Columbia), was both grief stricken and bitter because of the killing of his parents by Tyner, and he initiated discussions with an acquaintance, Jack Martin, who also lived in Horry County, about his (Cimo's) desire to have Tyner killed inside prison. Either Cimo or Martin knew an SCDC inmate, Gerald McCormick (called "Pop" by fellow inmates), who was in CB-2 until mid-August of 1982, and who knew both Petitioner Gaskins and Rudolph Tyner. Although McCormick did not testify in the Petitioner's trial for the murder of Tyner, the trial record makes it clear that McCormick put Petitioner Gaskins in touch with Cimo and Martin, and Gaskins thereafter made numerous collect telephone calls to either Cimo or Martin, or both, from telephones in CB-2 that were available to inmates. The Petitioner, who sometimes recorded calls he made for inmates to their loved ones so the inmates could replay the records, recorded some of the calls he made to Martin or to Cimo, and these records revealed starkly that the Petitioner planned to rig an explosive device to kill Tyner for Cimo after repeated efforts by the Petitioner to kill Tyner by poison had failed. Transcripts of one of these calls to Cimo and two to Martin appear at Tr. 4493-4498, 4499-4504, and 4505-4524.

The prosecution's evidence showed that the Petitioner kept numereus tools, wire, and television and radio parts in his cell. He arranged for Cimo to send him either a partial stick of dynamite, or some plastic explosive, with

a detonator to ignite the explosive material. The Petitioner, in the tape records, found in his possession after Tyner's death, explained how he planned to use the explosive to kill Tyner, rather than continue repeated unsuccessful attempts to poison him. James Arthur Brown, who was a "tier man" in CB-2, testified that shortly after the afternoon meal had been served on September 12, 1982, Petitioner Gaskins asked him to deliver an article to Tyner, described to Brown by Gaskins as a speaker device Tyner could use to communicate with Gaskins rather than to have to shout through a vent when Tyner wanted Gaskins to do something for him. Brown said Gaskins asked him to tell Tyner the wire needed to plug in the speaker was sticking through the bottom vent of his (Tyner's) cell, and that Tyner would know what to do with the wire. Brown testified that he delivered the speaker-like device and the message to Tyner, and then advised Gaskins, who said "O.K." After a few minutes, Brown heard the sound of a loud explosion. He went into the Petitioner's cell and saw Gaskins pulling a wire into his cell through a vent beneath the sink. Brown said Gaskins told him he would give him a couple of hundred dollars if he would keep his mouth shut, and then walked out to mingle with other CB-2 inmates who were looking for the site of the explosion.

There was a great deal of conflicting testimony about Petitioner Gaskins' whereabouts immediately after the

explosion was heard. Gaskins himself did not take the stand, but his attorneys called numerous inmates who were in CB-2 on September 12, 1982. As to be expected, the testimony was in conflict, but it is clear enough that the jury credited Brown's version of the circumstances which occurred just before and immediately after the explosion. The "workouts" started looking for the site of the loud noise, and two inmates called out to an officer in CB-2 when the fatally wounded Tyner was found sprawled in his cell. Tyner was taken to a prison infirmary where he died not long after the explosion. A pathologist, Dr. Edward W. Catalano (Tr. 3356-3372), said Tyner's death was "relatively quick" after he was injured, that extensive damage to Tyner's brain had been caused by the explosion, and that "severe central nervous system trauma" was the cause of death. The pathologist said on cross-examination that he never looked for medical signs that Tyner had been give poison, as the prosecution contended.

The jury convicted the Petitioner of murder. A penalty phase was held to determine the appropriate penalty. Although Petitioner Gaskins elected to not testify in either phase of his trial, he did avail himself of the right to make a closing argument to the jury in the sentencing phase of the trial. In his closing argument (Tr. pp. 4384-4391), Gaskins renounced as untrue several admissions he made in his four-day confession which was the principal topic of the

testimony of former Solicitor Summerford. He contended, in effect, that he only confessed because he was not aware the State could not have sought the death penalty then, but he admitted he was guilty of "some" of the earlier homicides, and that he was also guilty "of participating in" a plot to kill Rudolph Tyner, but he told the jury he was not involved in "the final preparations" to kill the already condemned man. (Tr. p. 4390). The jury sentenced Gaskins to death.

In the direct appeal of his conviction and death sentence, Gaskins preserved fifty-six exceptions for possible briefing and argument to the South Carolina Supreme Court. (Tr. pp. 4602-4618). However, twenty-seven of the exceptions were apparently abandoned, and the remaining twenty-nine exceptions were incorporated into the nineteen questions argued in the Brief of Appellant, and in the oral argument of the direct appeal. The Supreme Court denied the appeal on January 22, 1985. State v. Gaskins,, supra.

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

The panel opinion of the Court of Appeals for the Fourth Circuit held that the "substantial-doubt portion of the [reasonable doubt] instruction did not rise to the level of a due process violation." Gaskins v. McKellar, 916 F.2d 941, 952 (4th Cir. 1990). As to the alleged Caldwell v. Mississippi, 472 U.S. 320 (1985), violation, which occurred when the state introduced evidence of Petitioner's previously vacated death penalty in 1975 and the trial court's use

of the word "recommendation," the Court of Appeals concluded that "this evidence and the judge's statement 'had no effect on the sentencing decision.'" Gaskins, 916 F.2d at 953 (quoting Caldwell v. Mississippi, 472 U.S. at 341). The Court of Appeals' Opinion did note that

> Nowhere in this case did anyone imply that the jury's recommendation was nonbinding. ... [U]nder the circumstances, we are satisfied that the jury was properly aware of its sentencing responsibilities.

Gaskins, 916 F.2d at 953. Finally, the Court of Appeals agreed that the malice instruction given at Petitioner's trial constituted a burden shifting instruction, but concluded that any error was harmless beyond a reasonable doubt. Id. at 952.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. The trial court's instruction on reasonable doubt viewed in its entirety did not deprive the Petitioner of Due Process.

In his Petition, Gaskins seeks to have this Court grant certiorari to consider in a federal habeas corpus setting the standard jury instruction in South Carolina on reasonable doubt in which review has been consistently denied by the state court and this Court on many prior occasions. This review is sought despite the fact that the Fourth Circuit applied the appropriate standard of review for jury instructions in a habeas corpus setting wherein it concluded that the instruction is not likely to mislead the

jury into finding no reasonable doubt when in fact there was some. Gaskins v. McKellar, 916 F.2d 941, 954-955 (4th Cir. 1990). For the reasons set forth below, we submit that both the District Court and Court of Appeals properly denied habeas corpus relief in this matter and further review in certiorari is not warranted.

Challenges to jury instructions should not be viewed in artificial isolation, but must be viewed in the context of the overall charge in a habeas corpus proceeding. Cupp v. Naughten, 414 U.S. 141, 146 (1973); Francis v. Franklin, 471 U.S. 307 (1985). On collateral review of a state conviction, the role of the reviewing court is limited and the inquiry is narrow. Smith v. Bordenkircher, 718 F.2d 1273, 1276 (4th Cir. 1983). More precisely, the question in a habeas corpus proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not merely whether "the instruction is undesirable, erroneous or even universally condemned." Cupp v. Naughten, supra, 414 U.S. at 146-47; Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Cooper v. North Carolina, 702 F.2d 481, 483 (4th Cir. 1983). Stated another way, "the burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack is even greater than the showing required to establish plain error on direct appeal." Henderson v. Kibbe, supra, 431 U.S. at 154.

Recently, the Court addressed the legal standard for reviewing jury instructions in a direct appeal proceeding in Boyde v. California, ___U.S.___, 110 S.Ct. 1190 (1990). In Boyde, the Court concluded that where an instruction is ambiguous and subject to an erroneous interpretation "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 110 S.Ct. at 1198. Of pertinent importance to the issues, the Court stated as follows:

> This 'reasonable likelihood' standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id.

Respondents submit that the challenged instructions on reasonable doubt did not create a "reasonable likelihood" that the jury understood the instructions in an unconstitutional manner. Boyde, supra. Francis v. Franklin, supra. It is clear from the entire charge considered in context that a reasonable jury could not have misunderstood the nature and function of the concept of reasonable doubt.

On October 15, 1990, the United States Court of Appeals for the Fourth Circuit entered its opinion in which it relied upon its long established precedent of Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983), and that of this Court in Taylor v. Kentucky, 436 U.S. 478 (1978), to deny habeas corpus relief. The claim concerning the "reasonable doubt" instruction had not been presented in the state courts, but the District Court had chosen to review it under Granberry v. Greer, 481 U.S. 129 (1987), over Respondent's objection, because the "matter was lacking in merit as a colorable constitutional claim." (J.A. pp. 1113-1122, 1315-1316). In the appeal to the Fourth Circuit, the Petitioner claimed that the trial judge's definition of reasonable doubt as " a doubt for which you can give a reason, it is a substantial doubt," relieved the State of its burden of proof as required by In Re Winship, 397 U.S. 358 (1970). The Fourth Circuit addressed the issue as follows:

> Viewed in the context of the entire record of trial, the substantial doubt portion of the instruction did not rise to the level of a due process violation. First, the trial court employed the instruction to set in contrast "some imaginary doubt or some slight doubt or some fanciful doubt that you might have." (J.A. at 439). The trial judge's use of the term substantial doubt was, in context of the entire instruction, more accurate than when viewed in artificial isolation, and was

> not "likely to 'mislead the jury into finding no reasonable doubt when in fact there was some.'" Smith v. Bordenkircher, 718 F.2d at 1277. Moreover, the trial court flatly instructed the jury that "the proof offered by the state must exclude every other reasonable hypothesis except the guilt of the accused and must satisfy you beyond a reasonable doubt." (J.A. at 444). This instruction further neutralized any negative effects of the substantial doubt instruction. See Bordenkircher, 718 F.2d at 1277.
>
> We are not prepared to say that this instruction, even in combination with the substantial doubt instruction, "so infected the entire trial that the resulting conviction violates due process." Id. at 1276.

916 F.2d at 952-953. The Court concluded that the language here was not likely to mislead the jury into finding no reasonable doubt when in fact there was some.

Recently in U.S. v. Nolasco, ___F.2d___, 1991 Westlaw 17288 (9th Cir. February 15, 1991), the appellate court discussed definitions of reasonable doubt and their impact upon a jury. The requirement that a criminal charge must be proven beyond a reasonable doubt is "indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of 'certitude of the facts in issue.'" In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The reasonable doubt standard gives substance to the presumption of innocence and instills confidence in the community that the innocent will not be condemned. Id. at 363-64, 90 S.Ct. at 1072-73. A defendant in a criminal case therefore has a constitutional right to have the jury instructed that guilt must be established

beyond a reasonable doubt. United States v. Rhodes, 713 F.2d 463, 471 (9th Cir.), cert. denied, 464 U.S. 1012 (1983).

Because of the importance of understanding precisely what the words "reasonable doubt" mean as a legal standard, counsel for criminal defendants frequently request a further definition of those terms. At a minimum, the instructions to the jury must "as a whole, fairly and accurately convey the meaning of reasonable doubt." United States v. Clabaugh, 589 F.2d 1019, 1022 (9th Cir. 1979). Courts have struggled to articulate a clear and unambiguous definition of the term "reasonable doubt." Several circuits have held that the phrase is one of common usage and acceptance, requiring no definition beyond the language itself. See United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987), cert. denied, 486 U.S. 1009, 108 S.Ct. 1739, 100 L.Ed.2d 202 (1988); United States v. Lawson, 507 F.2d 433, 442-43 (7th Cir. 1974), cert. denied, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 762 (1975); Murphy v. Holland, 776 F.2d 470, 475 (4th Cir. 1985) (term has "self-evident meaning comprehensible to the lay juror"), vacated on other grounds, 475 U.S. 1138, 106 S.Ct. 1787, 90 L.Ed.2d 334 (1986). The Supreme Court has noted that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 138, 99

L.Ed. 150 (1954) (quoting Miles v. United States, 103 U.S. 304, 312, 26 L.Ed. 481 (1880). The Holland court nevertheless suggested that an acceptable definition would define reasonable doubt as "the kind of doubt that would make a person hesitate to act." Id. The challenge confronting a court that would define reasonable doubt is to avoid language that may "mislead the jury into finding no reasonable doubt when in fact there was some." Id.

The Petitioner now challenges two isolated portions (which counsel never objected to during the trial):

> I charge you first of all that it's a cardinal rule of law that everyone who is charged with a crime is presumed to be innocent until proven guilty by the state beyond a reasonable doubt. No defendant has to prove his own innocence. He is presumed innocent. And the state has the entire burden of proving to you beyond a reasonable doubt that he is guilty.
>
> Now, what is a reasonable doubt? First of all, let me tell you what it is not. A reasonable doubt is not some imaginary doubt or some slight doubt or some fanciful doubt that you might have. A reasonable doubt is, simply stated, a doubt for which you can give a reason. It is a substantial doubt; therefore, in viewing the evidence and the testimony that you have heard, from that testimony or evidence, or from the lack of testimony or evidence, if you have a reasonable doubt as to whether or not he is guilty on either of these charges, you have to find him not guilty.
>
> On the other hand, if you do not have a reasonable doubt in your mind, you have a duty to find him guilty.

(Tr. p. 4188, ll. 4-22). (J.A. p. 439). (Emphasis added).

The instruction on circumstantial evidence included the following:

> I charge you further that the mere fact that the circumstances are strongly suspicious and the defendant's guilt probable, is not sufficient to sustain a conviction, because the proof offered by the state must exclude every other reasonable hypothesis except the guilt of the accused and must satisfy you beyond a reasonable doubt.
>
> The two phrases, beyond a reasonable doubt and proof to a moral [certainty], are synonymous and the legal equivalent of each other. These phrases connote, however, a degree of proof distinguished from an absolute [certainty]. The reasonable doubt that the law in its mercy gives [to] the benefit of the accused is not a weak or a slight doubt, as I told you earlier, but a serious or strong and well founded doubt as to the truth of a charge.
>
> Now, I charge you further, ladies and gentlemen of the jury, that you must be convinced as I told you earlier that every circumstance relied upon to prove the guilt of the accused must be beyond a reasonable doubt. I have always likened circumstantial evidence to a chain where you have different links and that chain is put together. Each chain [sic] in that link [sic] must be consistently perfect or else it won't pull anything. So each circumstance relied on by the state must be consistently perfect and point to the guilt of the accused beyond a reasonable doubt.

(J.A. pp. 444-445). (Emphasis added).

In the instant case, the term "substantial doubt" was used to contrast "whimsical" or "imaginary" doubt, two phrases that clearly do not equate with "reasonable" doubt."[2] Clearly, a reasonable juror, as previously determined by the panel, would understand the phrase to conclude that a "reasonable doubt was not an unreal, idle, or imagi-

[2]As defined in Webster New World Dictionary 2nd College Edition (1976), the term "whimsical" means full of or characterized by whim or whimsy [a sudden fancy, idle and passing notion, capricious idea or desire] and the term "imaginary" means "existing only in the imagination; fanciful, unreal."

nary doubt, but rather a doubt that one is able to justify and draw a conclusion about soundly.[3] Simply put then, the definition by the trial court in the Gaskins case would not have misled the jury to lessen the state's burden when they act with "commonsense understanding." Boyde, supra, at 1198.

Further, the phrase "a serious, strong, or well-founded doubt" as a contrast to a weak or slight doubt, would not be construed by reasonable jurors to lessen the burden of proof in light of the context given. Here, the phrase did not destroy the jury's overall concept of reasonable doubt viewing the instruction as a whole. Here, the instruction properly advised the jury and "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he stands charged." Winship, supra, 397 U.S. at 364.

In the Fourth Circuit decision, the Court properly acknowledged that in some instances the trial court's charge on reasonable doubt may so alter the self-evident meaning of reasonable doubt that the jury is misled by the instruction thereby violating due process, citing its own decision in U.S. v. Moss, 756 F.2d 329, 333 (4th Cir. 1985). Certiorari is not necessary where the lower court has properly applied

[3]According to Webster's New Collegiate Dictionary the term "substantial" means "1. of or having substance; 2. real, actual, true, not imaginary."

the correct constitutional standard to the challenged phrases.

The Petitioner relies upon the recent per curiam decision in Cage v. Louisiana, ___U.S.___, 111 S.Ct. 328 (1990), which was entered after the opinion of this Court involving a direct appeal rather than habeas corpus. In the second portion of the argument, we submit that Petitioner's interpretation of Cage creates "new law not applicable in collateral review." We would further submit that Cage is also factually distinguishable. In Cage, the phrase "it must be such doubt as to rise to a grave uncertainty," to define reasonable doubt was used. This phrase is not included in Gaskins' instruction and lacks the common sense understanding of reasonable doubt which Gaskins' instruction included. In Gaskins, the restrictive definition of reasonable doubt did not suggest prove beyond a "grave uncertainty" was sufficient. Rather, properly stated in the context given, it required proof beyond a reasonable doubt to convict. Further, contrary to the position taken, the Court's Order in Cage did not find error in contrasting reasonable doubt as "founded upon a real, tangible basis" and not upon "mere caprice and conjecture." Also, in Gaskins, the jury's burden on doubt was directed to doubt "from that testimony or evidence or from the lack of testimony or evidence," (J.A. p. 439), which was the evidentiary certainty missing in Cage. Further, not included in Cage, which ameliorates

any other interpretation, Judge Laney instructed that suspicion or probability is not enough to convict because "the state must exclude every other reasonable hypothesis except the guilt of the accused and must satisfy you beyond a reasonable doubt." (J.A. p. 444). This phrase is certainly consistent with a reasonable juror's concept of reasonable doubt. Accord Smith v. Bordenkircher, supra.
See Lord v. State of Nevada, ___P.2d___, 1991 Westlaw 13535 (Nev. February 7, 1991) (approves instruction that reasonable doubt may be "actual and substantial"). Idaho v. Rhodes, ___P.2d___, 1991 Westlaw 15607 (Idaho, February 13, 1991).

The Petitioner further urges that this error is exacerbated by the prosecutor's closing argument wherein he "predicted and stressed the erroneous instructions." Petition, p. 10. As the Court recognized in Boyde, supra, 110 S.Ct. at 1200, prosecutorial arguments "are likely viewed as statements of advocates" whereas jury instructions "are viewed as definitive and binding statements of the law." The argument must be judged in the context in which they are made. Boyde, supra. Here, the prosecutor spoke of reasonable doubt as a substantial doubt and not imaginary or fanciful and told the jury to remember what Judge Laney told them about reasonable doubt. (J.A. pp. 364-365). If that was an argument which misstated the law, it was subject to objection and correction by the Court. Greer v. Miller, 483

U.S. 756, 765-6 (1987). The Solicitor's brief reference to a "substantial doubt" as not imaginary or fanciful did not have its most damaging meaning as suggested by Petitioner and this Court should not infer such. Boyde, supra, at 1200, Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974). His assertion to the contrary must be rejected. Certiorari review is not warranted.

II. The Petitioner's interpretation of Cage v. Louisiana would create a "new rule" which should not be applied in habeas corpus to final cases.

The Petitioner contends that the mere use of the words "substantial," "strong," or "serious" alone may require reversal. (Petition, pp. 8-12). If Cage, supra, is interpreted by the Court to suggest that, it must be barred under the Teague v. Lane, 489 U.S. 288 (1989), standard as a "new" constitutional rule of criminal procedure that does not apply retroactively to cases on federal habeas corpus review. Recently, in Butler v. McKellar, 110 S.Ct. 1212 (1990), the Supreme Court held that a Teague "new rule" will not be applied on habeas corpus review where the outcome "was susceptible to debate among reasonable minds" among jurists and is not dictated by existing precedent. Butler, supra, 110 S.Ct. 1217. Accord Sawyer v. Smith, ___U.S.___, 110 S.Ct. 2822, 2827 (1990). Clearly, the position espoused by the Petitioner was clearly not dictated by the precedent

of the United States Supreme Court.[4]

First, in Taylor v. Kentucky, 436 U.S. 478, 488 (1978), the Court discussed a similar definition of "reasonable doubt as a substantial doubt, a real doubt" and stated "this definition, though perhaps not in itself reversible, often has been criticized as confusing." Also, Holland v. U.S., 348 U.S. 121 (1954). Further, certain members of the Court dissented to petitions for certiorari in direct appeals from South Carolina convictions and commented on these claims. Butler v. S.C., 459 U.S. 932 (1982) (Marshall, J., dissenting from denial of certiorari); Adams v. S.C., 464 U.S. 1023 (1983) (Marshall, J., dissenting from denial of certiorari). It is further clear that certain federal courts, including this Court, have not accepted the per se treatment Petitioner now suggests. Smith v. Bordenkircher, supra, Gaskins v. McKellar, supra; U.S. v. Magnano, 543 F.2d 431, 437 (2nd Cir. 1976) (substantial not shadowy); U.S. v. Christy, 444 F.2d 448 (6th Cir. 1971) (reasonable, substantial); U.S. v. Gratton, 525 F.2d 1161, 1162 (7th Cir. 1975) (substantial rather than speculative); U.S. v. Rodriquez, 585 F.2d 1234, 1241 (5th Cir. 1978) (same); Darnell v.

[4]In his Petition, Gaskins contends that since we failed to assert a non-retroactivity argument in the lower court, we have waived our right to present it herein, citing Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1990). Hanrahan is not applicable because Cage was decided after the panel decision and Respondents were successfully contending the instruction complied with prior decisions of the Fourth Circuit, Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983). This is the first opportunity to assert it.

Swinney, 823 F.2d 299 (9th Cir. 1987) ("actual, substantial"). In Holland v. U.S., 348 U.S. 121 (1954), the Court suggested a definition for reasonable doubt as "the kind of doubt that would make a person hesitate to act."

In addition to the constant affirmation of similar instructions in South Carolina and Louisiana courts, the following state courts have rejected similar challenges: State v. MacDonald, 571 P.2d 930 (Wash. 1977); State v. Davis, 482 S.W.2d 486 (Mo. 1972); Smith v. State, 547 S.W.2d 925 (Tenn. 1977). Clearly, the issue raised herein, under the Petitioner's interpretation of Cage, a state court considering Gaskins' claim at the time his conviction became final (1983) would not have felt compelled by existing precedent to conclude that the rule Smart seeks was required by the Constitution. See Saffle v. Parks, 110 S.Ct. 1257, 1260 (1990). Respondents further submit that the Teague exceptions clearly have no applicability to this case. Henderson v. Smith, 903 F.2d 534, 539 (8th Cir. 1990); Zettlemoyer v. Fulcomer, 923 F.2d 284 (3rd Cir. 1991).

The Petitioner contends that Yates v. Aiken, 484 U.S. 211 (1988), is analogous to this situation. Clearly, his analysis is not accurate. Cage, for the first time, held that a definition of reasonable doubt given the case including the use of the word "substantial" in context with other terms deprived a defendant of due process. In Winship, supra, the Court held that the reasonable doubt stan-

dard was constitutionally applicable to juvenile cases as well as adult cases. When given the opportunity to establish the Cage issue in Taylor v. Kentucky and Holland, the Court declined to do so. That is far different from the Yates situation, which held that Sandstrom v. Montana, 442 U.S. 510 (1979), was the same as Francis and fully applicable to Yates conviction which occurred subsequent to Sandstrom. Like the situation in Butler and Saffle, the challenge to the trial judge's attempt to remove the jury's decision from whim and caprice in its instructions did not violate the constitution or precedent of the Court as it existed at the time of trial. Certiorari solely based upon the intervening decision in Cage v. Louisiana, supra, should be similarly denied.

III. The Eighth and Fourteenth Amendments were not violated in the sentencing phase of Petitioner's 1983 murder trial when a witness testified that the death sentence for an earlier and unrelated murder conviction had been vacated and the reasons for not seeking the death penalty in another case.

The Fourth Circuit, as well as the lower courts, properly concluded the sentencing phase testimony of a former prosecutor and the jury instructions using the word "recommend," did not diminish the jurors' responsibilities for determining the imposition of the death penalty in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).

Gaskins, 916 F.2d at 953. Also (J.A. pp. 1132-1145, 1191-1195, 1321-1322, 1328-1329). Respondents submit these decisions applied appropriate constitutional standards and certiorari review is not warranted.

In Caldwell v. Mississippi, 472 U.S. 372 (1985), the Supreme Court held that it was constitutionally impermissible for a death sentence to rest on a determination made by a sentencer that the responsibility for the appropriateness of Caldwell's death sentence to rest elsewhere. There, the prosecutor told the jury that "your decision is not the final decision ... your job is reviewable ... the decision you render is automatically reviewable by the Supreme Court ...." Caldwell, 472 U.S. at 325. The Court concluded that because the jury's sense of responsibility for determining the appropriateness of death was minimized by the prosecutor's closing argument and might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment.

The Court recently returned to the Caldwell issue in Dugger v. Adams, 489 U.S. 401 (1989), 109 S.Ct. 1211 (1989). In Dugger, the Court stated that "if the challenged instructions accurately describe the role of the jury under state law, there is no basis for a Caldwell claim. To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role of the jury assigned by local law." Dugger v. Adams,

supra, 109 S.Ct. at 1215.

In the case before this Court, there was no Caldwell violation. The Petitioner first complains about the testimony of former Solicitor T. Kenneth Summerford. He was permitted to testify at the penalty phase of Petitioner's trial that Gaskins had previously been sentenced to death in 1976 for the death of Dennis Bellamy. (J.A. pp. 543-544). Additionally, he was permitted to testify that the South Carolina Supreme Court had subsequently declared the death penalty statute under which Petitioner had been sentenced unconstitutional and, therefore, had vacated his death sentence and imposed a sentence of life imprisonment. (J.A. p. 544). Finally, Summerford was permitted to explain why he had decided to permit Petitioner to enter into a plea bargain agreement for a life sentence in connection with the death of Johnny Knight and others in 1978, when it was determined that he could not seek the death penalty. (J.A. p. 544).

The state court concluded that the testimony was "relevant to the sentencing determination because it relates to Gaskins' record of prior criminal convictions for murder. Testimony concerning prior criminal convictions is admissible as additional evidence during the sentencing phase of a capital case," citing State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984). State v. Gaskins, supra, 326 S.E.2d 144. Further, the state court concluded the testimony factually

apprised the jury of the criminal record and outcome of those prosecutions. As the court stated: "Nothing in his testimony can be construed as an attempt to minimize the jury's responsibility in imposing a sentence. Also, nothing in his testimony indicated Summerford's personal opinion about the decision of seek the death penalty in the present case." Id.

Further, as a result of the searching examinations of the jurors who sat for Gaskins' trial, these jurors could not have reasonably believed that their sentencing verdict was only a technicality that would be set aside if a properly constituted authority disagreed with their verdict as was suggested in Caldwell. The testimony of Mr. Summerford may have tended to divert the jury's attention, because of the disagreement over whether Gaskins could have received the death penalty for the two killings triable in Summerford's circuit that occurred in October, 1975, but the diversion, if any, could have only been temporary. In retrospect, it is plausible argument to say that it would have been preferable if the prior death sentence had not been mentioned, but that development, and Gaskins' later decision to confess his crimes and plead guilty, were the factors of the major statutory aggravating circumstance relied upon by the state in seeking the death penalty for Tyner's murder. As the South Carolina Supreme Court stated, Summerford's testimony was relevant to the sentencing determination for that rea-

son, and the reversal of Gaskins' prior death sentence is a matter of public record. Id.

Next, the Petitioner complains that the trial judge's use of the term "recommend" in his sentencing instructions created a Caldwell error by misleading the jurors in their role. For the reasons stated in the lower courts, we submit that this issue lacks merit.

The South Carolina capital sentencing statute, South Carolina Code Ann., Section 16-3-20(C) (1990 Cum. Supp.), uses the term "recommendation" when referring to the jury's verdict in the sentencing phase of a trial. In State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), the trial judge was asked to explain to the jury that its recommendation of sentence would be binding. The request was denied, and on appeal, the South Carolina Supreme Court held the denial was not error. In State v. Linder, 278 S.E.2d at pages 338-339, the court stated:

> Use of the word "recommend" by the trial judge or solicitor is not per se suspect. Under the statute "recommendation" is the term applied of the jury's function at this phase of the trial. To instruct the jury that it will recommend what sentence the convicted murderer will be given is not improper and does not mask the true nature of the [jurors'] responsibility at this phase of the trial.

Under South Carolina law, the jury's sentencing recommendation is binding on the trial judge, but if the recommendation is for death, prior to imposing the sentence the trial judge must find as a fact whether it "was warranted under

the evidence of the case and was not the result of prejudice, passion, or any other arbitrary factor." Section 16-3-20(C) (1988 Cum. Supp.). State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979) (prosecutorial comment about reviewing of death sentences improper).

Voir dire examination of the jurors seated in the trial reveal that each was aware of the binding nature of their decision. When the voir dire examinations of the twelve jurors who returned the death verdict are viewed, it can be seen why Gaskins' defense attorneys did not ask Judge Laney to instruct these jurors that their verdict would be binding as to the sentence Gaskins would receive, and why the attorneys also registered no objection to Judge Laney's use of "recommendation" when speaking of the verdict in his instructions. Every one of these twelve jurors was told, in one manner of speech or another, and with one degree of emphasis or another, that their verdict would represent the sentence to be imposed upon Gaskins. These incidents during their voir dire examinations are noted here for the convenience of the court in checking through the voluminous transcript of the jury-selection process.

The very first juror selected, Rosa L. Jacobs, received the least emphatic description of the jury's role in fixing sentence. Judge Laney used the word "recommend" once (Tr. p. 272, l. 1)., but Mr. Young, in examining Ms. Jacobs for Gaskins, asked her if she could vote to "give" or

not "give" Gaskins the death penalty. (Tr. p. 285, ll. 8-9). Every juror selected after Ms. Jacobs was advised repeatedly in questioning that the jury's role was to fix Gaskins' sentence if he should be found guilty of murder in the first phase of the trial. (See Magistrate's Report, J.A. pp. 1137-1142, summarizing the voir dire responses).

It can be seen from the record that Gaskins' attorneys, and Gaskins himself, could have entertained no realistic concern at tall that Judge Laney's use of the statutory term "recommendation" in his instructions to the sentencing jury would have led the jury to ignore its role by returning a verdict its members thought would be nonbinding. The jurors who answered the questions on their individual voir dire examinations were made clearly aware that their role was not that to merely recommend. The record thus reveals why there was no exception made to Judge Laney's use of the statutory term in explaining the sentencing verdict. Wainwright v. Witt, 469 U.S. 412, 435 (1985) (no reason for counsel to object where propriety in entire record so clearly perceived by all counsel present there was no reason to question the judge's instruction). Therefore, because of the absence of an indication that either Judge Laney or the prosecutors misled the jury as to its full responsibility under South Carolina law to determine Petitioner Gaskins' sentence, certiorari on this issue is not warranted. Similarly, the arguments of both the defense

counsel and prosecutor stressed that the sentence would be their decision.[5]

Clearly, there was no Caldwell error. Gaskins can point to no references by the prosecution or the trial judge concerning death sentence review in this case. Further, no where in this case did anyone imply that the jury's recommendation was non-binding as in Caldwell. Clearly, this jury was properly aware of its sentencing responsibility. Gaskins' present assertion is without merit.

IV. The instructions on implied malice given in the guilt phase of Gaskins' murder trial in 1983 were harmless beyond a reasonable doubt.

In his final assertion why certiorari should be

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[5]In closing arguments, Gaskins and both his attorneys told the jury they were seeking to have Gaskins' life spared. Mr. Young argued first. He referred of the indictment as a "death warrant" (Tr. p. 4380), said he was asking that Gaskins' life be spared (Tr. p. 4383), told the jury the State wanted it "to kill" Gaskins (Tr. p. 4381), and referred to the contingency of a "vote to fry Pee Wee Gaskins" (Tr. p. 4382). Gaskins told the jury he was asking for his life (Tr. p. 4384). Mr. Swerling told the jury that Gaskins asked for a jury trial so a jury could decide his sentence rather than a judge (Tr. p. 4393). He also said he was asking the jury for Gaskins' life (Tr. p. 4397 and p. 4405), and at one point said the jury by its verdict would decide whether "to kill a man" (Tr. p. 4399). The defense argument also reminded jurors of their answers to questions on voir dire.

The prosecutors made no comments that would mislead the jury, either. Mr. Anders referred to "passing penalty" upon Gaskins (Tr. p. 4372), and asked the jury to sign the verdict to "give Mr. Gaskins what he deserves, the death penalty." (Tr. p. 4374). Mr. Harpootlian reminded the jurors that during their voir dire examinations they had indicated they could "give a death sentence" under the proper circumstances, and could "impose the death penalty". (Tr. p. 4375). He later again said the jury should "consider the imposition of the death penalty" (Tr. p. 4376), and urged each juror to "decide that [Gaskins] will die in the electric chair." (Tr. p. 4379).

granted, Gaskins contends that the lower courts' harmless error analysis cannot withstand analysis was incorrect because the evidence was not "overwhelming." In the habeas proceedings in the District Court and Court of Appeals, each concluded that the alleged constitutional error was harmless beyond a reasonable doubt. (J.A. pp. 1326-1327). Gaskins v. McKellar, supra, 916 F.2d at 951-952. Particularly, the Fourth Circuit applied the harmless error issue as follows:

> Here, the jury necessarily found by its guilty verdict that Gaskins had murdered Tyner with a bomb Gaskins had built from electronic components in his cell and a piece of dynamite he received in the mail, so it is difficult to see how the jury could not have concluded, even without the presumption, that the killing was done "with malice." Aside from the raw circumstances of the killing, transcripts of conversations between Gaskins and Jack Martin (the intermediary who procured Tyner's murder) constitute further overwhelming evidence of malice. We therefore can say "'beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.'" Id. [Citing Rose v. Clark, 478 U.S. 570, 583 (1986).

Gaskins, supra, 916 F.2d at 952. Also (J.A. pp. 1326-1327). Respondents submit that certiorari is not necessary where the lower federal courts applied the appropriate constitutional standards to the unique facts of Mr. Gaskins' case.

Assuming as we must in the current procedural posture of this case that the use of the phrase "while malice is presumed form the use of a deadly or dangerous weapon ... where circumstances relating and surrounding the incident are brought out, then the presumption vanishes and malice again must be proven to you beyond a reasonable

doubt" was not only a violation of a state law mandate in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1994), but also we must assume a federal constitutional violation since it was so determined by the lower courts which we are not presently cross-petitioning on, we submit that it was harmless beyond a reasonable doubt. Rose v. Clark, 478 U.S. 470 (1986); Connecticut v. Johnson, 460 U.S. 73 (1983) (execution style killing may be harmless error). In Rose v. Clark, supra, the Supreme Court held that the harmless constitutional error standard of Chapman v. California, 386 U.S. 18 (1967), applied to burden-shifting jury instructions which violate Sandstrom v. Montana, 442 U.S. 510 (1979). Accord Pope v. Illinois, 481 U.S. 497 (1987). In Rose, the court stated:

> 'Chapman mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless.' [citations omitted]. The question is whether, 'on the whole record ... the error ... [is] harmless beyond a reasonable doubt.' [citations omitted]. ... [I]n cases of Sandstrom error, 'the inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.

Rose, 478 U.S. at 583. See U.S. v. Frady, 456 U.S. 152 (1982); Pope v. Illinois, supra; Lancaster v. Newsome, 880 F.2d 362 (11th Cir. 1989); Rodriquez v. Young, 906 F.2d 1153 (7th Cir. 1990).

Here, the Petitioner contends that there was not harmless error because evidence of his malice was not over-

whelming and the primary evidence of malice came from several murderers. Such comment defies a reasonable review of the record. In all of the arguments everywhere advanced by Gaskins about Judge Laney's instructions to the jury concerning malice, and in the decision of the South Carolina Supreme Court, no specific mention has been made of the fact that Judge Laney also explained express malice. At Tr. p. 4190, 11. 9-18, he instructed the jury as follows:

> I charge you that the words expressed or implied do not mean different kinds of malice, but merely the manner in which malice can only be shown to you; that is, either by positive evidence or by inference. Expressed malice is where one person kills another with a sedate, deliberate mind formed design -- such formed design being evidenced by external circumstances disclosing the inward intention of that person. It may be expressed, for example, where there are previous threats, where there is a lying in wait, or other circumstances showing directly an intent to kill
> ....

This definition of express malice has been approved of express malice has been approved by this Court in Sparf and Hansen v. U.S., 156 U.S. 51, 60 (1895), and properly states the common law in South Carolina. State v. Petsch, 43 S.C. 132, 135-136 , 20 S.E. 993, 994 (1894); State v. Lee, 79 S.C. 223, 60 S.E. 524 (1908). See 40 C.J.S. Homicide Section 16.

It has been stated that a Sandstrom error on intent (or malice) may be harmless where the intent to kill is conceded by the defendant or otherwise not put in issue at trial. Tucker v. Kemp, 762 F.2d 1496, 1501 (11th Cir.

1985) (en banc), cert. denied, 478 U.S. 743 (1986) (erroneous instruction on intent harmless where "sole defense was non-participation in the killing). Also, a Sandstrom error may be harmless where the evidence of his guilt is so overwhelming as to make inclusion of the erroneous instruction irrelevant to the outcome of the jury verdict. Dick v. Kemp, 833 F.2d 1448, 1453 (11th Cir. 1987). In deciding whether the evidence was overwhelming, the crucial inquiry may relate to whether or not there exists overwhelming evidence of intent (or malice), rather than the more inclusive question of guilt.

Here, Gaskins' malicious intent is expressively overwhelming in the record. Here, the jury found Gaskins guilty of the murder of Tyner under the circumstances of execution previously set forth in the Statement of the Case. The jury also had before it evidence of Gaskins' attempt to poison Tyner. After he had failed in his effort to kill Tyner by poisoning, he talked to his co-conspirator Tony Cimo in an introduced recorded conversation as follows:

> Gaskins: It just make 'em sick as hell and that's it. So, I come up with something told him [Referring to Gerald McCormick] that I would call you, if you wanted me, and tell you if you'll send it, it can't be no damn making sick on it. I need -- one electric cap and as much of a stick of damn dynamite as you can get. I'll take a damn radio and rig it into a bomb to where he plugs it up, that son of a bitch'll go off and it won't be damn coming back on that.
>
> ....
>
> Gaskins: That's about the best way that I can

figure to get him. Because everything we get him just looks like it just makes him sick as hell and that's it. But one electric cap and as much of a stick you can get in as pure as you can get it, he told me to call you and maybe over the weekend you can find one stick somewhere and get it to me and damn if I can't fix him up.

(Tr. p. 4495). The telephone conversations reveal similar expressions of malice against Tyner by Gaskins concerning his design to kill him:

> Tr. 4498 Get me enough to do that damn job and listen for the bang.
>
> Tr. 4502 That's enough [drug] to bust his heart.
>
> Tr. 4503 When that thing melts in his belly, that's "Katie bar the door."
>
> Tr. 4521 The next night after I get it [i.-e., poison] ... that son of a bitch'll be laid out.
>
> Tr. 4522 After I've got it ... the next night, you'll know that son of a bitch is on his way to hell.
>
> Tr. 4522 I want to get him and get him on out of here.
>
> Tr. 4522 That's a hell of a hard nigger to get rid of.
>
> Tr. 4523 When I get some, ... then you'll know the next night he's got it.

Further, in the prosecution's closing argument, the prosecution did not argue that malice can be presumed. The Assistant Solicitor, Mr. Harpootlian, argued premeditation by Gaskins and pointed to Gaskins' conversations with Jack Martin as evidencing "twenty-five minutes worth" of an intent to kill Rudolph Tyner. (Tr. pp. 4118, 4125). Com-

pare Hyman v. Aiken, 824 F.2d 1405 (4th Cir. 1987) (no harmless error under similar instruction where prosecutor in argument urged the erroneous presumption).

Here we are faced with an execution style murder of Rudolph Tyner. Under the evidence presented in his 1983 trial the jury did not have to rely upon any presumption of malice to find both Gaskins' heart, and his expressly revealed plans to kill Tyner, as laden with malice as the speaker he rigged and the drugs he gave Tyner were laden with materials fashioned to end Tyner's mortal existence without due process of law. Reviewing the trial record as a whole, U.S. v. Hasting, 461 U.S. 499, 509 (1983), any court can confidently ascertain that malice was overwhelmingly established by these expressions in the trial record that a jury would have found it unnecessary to rely on the "presumption." Rose, 478 U.S. at 583. Just as the jury found the prisoner guilty in Frady, supra, could have found "malice aplenty," (456 U.S. at 171) and "not only ... malice, but premedita[tion] and deliberate intent," the jury which found Gaskins guilty heard and saw overwhelming evidence of malice. Further, there is no "reasonable likelihood" the jury was affected by Judge Laney's instructions on implied malice, in light of his instructions on malice and express malice and the conclusive evidence of malice in this record. Boyde v. California, ___U.S.___, 110 S.Ct. 1190 (1990). See Myrick v. Mashner, 799 F.2d 642 (10th Cir. 1986) (erroneous

charge harmless error where actions as aider and abettor sufficiently showed intent). McKenzie v. Risley, 801 F.2d 1519, 1526 (9th Cir. 1986) (violent torture -- murder presents overwhelming evidence of intent to be harmless error); Beck v. Norris, 801 F.2d 242 (6th Cir. 1986) (defense of non-participation leads to harmless Sandstrom errors). Further delay into the finality of these proceedings is unnecessary in light of the record before this Court.

CONCLUSION

For each of the foregoing reasons, Respondents request that the Petition for Certiorari be denied.

Respectfully submitted,

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Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

ATTORNEYS FOR RESPONDENTS

By: Donald J. Zelenka

April 16, 1991
Columbia, South Carolina

IN THE SUPREME COURT
OF THE UNITED STATES

No. 90-7469

October Term, 1990

DONALD HENRY GASKINS,

Petitioner,

versus

KENETH D. MCKELLAR, WARDEN, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief in Opposition to Petition for Writ of Certiorari on the Petitioner by depositing one copy of the same in the United States mail, first-class postage prepaid, and addressed to John H. Blume, Esquire, P. O. Box 11311, Columbia, South Carolina 29211. He further certifies that all parties required to be served have been served.

This 16th day of April, 1991.

Donald J. Zelenka

SWORN to before me this
16th day of April, 1991.

Frances A. Cowan (LS)
Notary Public for South Carolina

My Commission Expires: 4-14-97

The State of South Carolina

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April 16, 1991

Honorable William K. Suter
Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Donald Henry Gaskins v. McKellar et al.
No. 90-7469

Dear Mr. Suter:

Enclosed please find the original and ten copies of Respondents' Brief in Opposition to Petition for Writ of Certiorari for filing in the above action.

Sincerely,

Donald J. Zelenka
Chief Deputy Attorney General

bbb
enclosures
cc: John H. Blume, Esquire
S. C. Death Penalty Resource Center
P. O. Box 11311
Columbia, South Carolina 29211

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-7469

DONALD HENRY GASKINS,

Petitioner,

v.

KENNETH D. MCKELLAR, Warden, South Carolina Department of Corrections, and the Attorney General of South Carolina,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I. The trial court's instructions regarding reasonable doubt impermissibly lessened the state's burden of proof in violation of the Due Process Clause of the Fourteenth Amendment.

A. Scope of review.

First, respondents appear to suggest that the general principles enunciated in Cupp v. Naughten, 414 U.S. 141 (1973), mandate a more deferential form of review of the jury instructions challenged in this habeas proceeding than was true in Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990), since Cage was decided on direct appeal. Brief in opposition at 9-10. Petitioner submits that this argument misunderstands Cupp v. Naughten. Cupp does remind federal habeas courts that their inquiry is limited to whether, considered in the context of the whole record, a challenged jury instruction "violated some right which was guaranteed to the defendant by the Fourteenth Amendment." 414 U.S. at 146. But due process is undeniably violated whenever a trial court's instructions on reasonable doubt, taken as a whole, fail to convey the meaning of that concept. Cage v. Louisiana.[1] That being so, relief is mandated in such cases, whether the error is first identified on direct appeal or on federal habeas corpus review.

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[1]In this connection, it should be recalled that one of the reasons why the Court found the erroneous instruction in Cupp v. Naughten did not rise to the level of a federal constitutional violation was precisely that the trial judge fully and correctly instructed the jury on the state's burden of proving the defendant's guilt beyond a reasonable doubt. 414 U.S. at 143, 147-49.

Indeed, this Court has recognized that a failure to instruct on reasonable doubt is among the relatively few constitutional errors which can never be disregarded as harmless. Jackson v. Virginia, 443 U.S. 307, 320 n. 14 (1979); Arizona v. Fulminante, No. 89-839, slip op. at 7 (U.S. March 26, 1991) (White, J., dissenting in part). It is "an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon proof . . . beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. at 316. When a habeas petitioner establishes that such an "essential of . . . due process" was denied at his trial, he has made the requisite showing of an error which "by itself so infected the entire trial that the resulting conviction violated due process." Cupp v. Naughten, 414 U.S. at 147. Petitioner has made virtually the identical showing here as led the Court to reverse the conviction in Cage v. Louisiana, and the Due Process Clause of the Fourteenth Amendment likewise entitles him to relief.

Respondents' reliance on Boyde v. California, ___ U.S. ___, 110 S.Ct. 1190 (1990), is misplaced. Boyde held that where an instruction is ambiguous, the party seeking reversal on the grounds of the instruction's alleged unconstitutionality must establish a reasonable likelihood that a reasonable jury would actually have resolved the instruction's ambiguity in an unconstitutional manner. Here, as in Cage, the challenged instructions are not ambiguous, but simply wrong. In almost identical ways, the instructions in

Cage and in this case repeatedly and consistently minimized the degree of certainty required for conviction. Respondents have stressed the trial judge's reiteration of the term "reasonable doubt," and of the presumption of innocence--all features of the Cage instructions as well--but have pointed to no portion of the charge which tended to correct the judge's misdefinitions of the reasonable doubt standard, or which rendered the misleading reasonable doubt instructions merely "ambiguous."

In this connection, it should be kept in mind that the stringency of the reasonable doubt standard does not involve a mere "shading[] of meaning." Boyde v. California, 110 S.Ct. at 1198. Rather, the precise degree of certainty which the rule of reasonable doubt embodies is the very content of the constitutional guarantee itself. To insist on this degree of certainty, as the Court did in Cage, is not "technical hairsplitting," id., but an indispensable requirement of due process of law.

B. The merits of the Winship/Cage claim.

Respondents' attempt to distinguish Cage on the merits calls for little comment. Respondents emphasize that the challenged terms in this case were juxtaposed to modifiers such as "whimsical," "imaginary," and "weak and slight," Brief in Opposition at 16-17, but fail to acknowledge that the same was true of the instructions in Cage. Respondents also insist that Cage is distinguishable and that the instruction in this case was a less restrictive definition of reasonable doubt than that used in Cage. Brief in Opposition at 18-19. Respondents fail to undertake any

actual comparison of the instructions in the two cases, however, and provide nothing to support for their conclusory assertions that the instructions are distinguishable.[2]

C. Retroactivity.

Finally, respondents attempt to create the appearance of a retroactivity question by characterizing petitioner's claim as being that "the mere use of the words 'substantial,' 'strong,' or 'serious' alone may require reversal." Brief in Opposition at 20. Petitioner has, of course, advanced no such argument. His position is simply that In re Winship, 397 U.S. 358 (1970), obligates a criminal trial judge to instruct the jury concerning the state's burden of proving guilt beyond a reasonable doubt, and that the instructions used for this purpose must fairly convey the protection which the reasonable doubt standard affords. Respondents' effort to recast this straightforward and noncontroversial legal proposition into an effort to create a "per se" rule of reversal triggered by the presence of particular forbidden words shows only the artificiality of respondents' retroactivity argument.

Moreover, the cases cited by respondents in their effort to knock down the straw man of "per se treatment," Brief in Opposition at 21, actually reveal how unusual were the misdefinitions of reasonable doubt given to the jury in Cage and in this case.

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[2]In this section of their brief, respondents cite Lord v. State, 806 P.2d 548 (Nev. 1991). Lord actually supports petitioner's position. In Lord, the Nevada Supreme Court rejected a Winship/Cage challenge to an instruction that a reasonable doubt must be "actual and substantial, not mere possibility or speculation," only because of the absence of additional modifying language such as "grave" or "moral certainty." Id., 806 P.2d at 555.

Almost every case cited, other than those from South Carolina and from the Fourth Circuit, involve single isolated instructions containing no more than the phrase "substantial doubt." Taylor v. Kentucky, 436 U.S. 478, 488 (1978) ("substantial doubt, a real doubt"); United States v. Magnano, 543 F.2d 431, 437 (2d Cir. 1976) ("substantial and not shadowy"); United States v. Christy, 444 F.2d 448, 450-51 (6th Cir. 1971) (isolated use of words "reasonable, substantial" does not constitute plain error in absence of contemporaneous objection); United States v. Gratton, 525 F.2d 1161, 1162 (7th Cir. 1975) ("substantial rather than speculative" instruction does not amount to plain error); United States v. Rodriguez, 585 F.2d 1234, 1241 (5th Cir. 1978) (same); Darnell v. Swinney, 823 F.2d 299 (9th Cir. 1987) ("actual, substantial" language insufficient to warrant habeas relief); State v. MacDonald, 571 P.2d 930 (Wash. 1977) ("substantial doubt" disapproved, but not reversible error); State v. Davis, 482 S.W.2d 486 (Mo. 1972) ("substantial doubt"); Smith v. State, 547 S.W.2d 925 (Tenn. 1977) (use of "substantial doubt" is error, but harmless). That respondents are apparently forced to rely on such obviously inapposite cases shows only that actual misdefinitions of reasonable doubt are rare, and that compliance with Winship has not posed any serious problem for the vast majority of American trial courts.

To be sure, it does appear than the supreme courts of Louisiana and South Carolina have repeatedly approved erroneous reasonable doubt instructions in the years since Winship. State v. Cage, 554 So. 2d 39, 41 (1989) ("grave uncertainty . . . actual,

substantial doubt . . . moral certainty"), rev'd, ___ U.S. ___, 111 S.Ct. 328 (1990); State v. Taylor, 410 So. 2d 224, 225 (La. 1982) (same); State v. Stramiello, 392 So. 2d 425, 429 (La. 1980) ("grave uncertainty"); Adams v. South Carolina, 464 U.S. 1023 (1983) (Marshall, J., dissenting from denial of certiorari) ("a substantial doubt, a doubt for which you can give a reason . . . a strong and well-founded doubt"); Butler v. South Carolina, 459 U.S. 932 (1982) (Marshall, J., dissenting from denial of certiorari) ("a substantial doubt for which an honest person seeking the truth can give a real reason . . . a serious or strong or well-founded doubt"). But the fact that these two state courts have on occasion failed to enforce the command of Winship in their review of jury instructions in criminal cases prior to Cage v. Louisiana surely does not establish that "a state court considering [petitioner's] claim at the time his conviction became final would [not] have felt compelled by existing precedent to conclude" that the reasonable doubt instructions in petitioner's case violated due process, Saffle v. Parks, ___ U.S. ___, 110 S.Ct. 1257, 1260 (1990), or that Cage is therefore a "new" rule of criminal procedure under Teague v. Lane, 489 U.S. 288 (1989). The mere fact that some lower courts--including, in this case, the South Carolina Supreme Court--failed correctly to apply Winship to jury instructions which by their terms violated Winship's central tenet does not mean that these courts were not "compelled" by Winship to reach the correct result. It simply means that they erred. It was to redress such federal constitutional error by state courts that Congress created

the habeas remedy. 28 U.S.C. §2241. If the existence of such wrongly-decided cases were sufficient to establish that any subsequent case which is correctly decided makes "new law" inapplicable on collateral review, federal habeas corpus review would become wholly circular, because the very existence of a recurring federal constitutional violation in the state courts would deprive the federal courts of the power to correct the error.[3]

The words which unconstitutionally burdened the reasonable doubt instructions in this case did not acquire new or different meanings in the years since petitioner's case become final on direct review. Cage simply applied this Court's "commonsense understanding," Boyde v. California, 110 S.Ct. at 1198, and the insight to be derived from any standard dictionary, to hold that when a trial court permits a conviction on proof satisfying the jury beyond a "substantial" or "well-founded" doubt, the accused has been denied the benefit of the reasonable doubt rule. Here the trial judge emphatically authorized conviction upon proof of guilt

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[3]Parenthetically, petitioner would note respondents' citation of this Court's denials of certiorari in two South Carolina direct appeals involving virtually identical reasonable doubt instructions as additional evidence that the constitutional doctrine which petitioner invokes would constitute a "new" rule under Teague. Brief in Opposition at 21, citing Adams v. South Carolina, 464 U.S. 1023 (1983) (Marshall, J., dissenting from denial of certiorari); Butler v. South Carolina, 459 U.S. 932 (1982) (same). Respondents apparently misread Teague as having effectively voided the long-established rule that "a denial of a petition for certiorari has no significance as a ruling," Parker v. Ellis, 362 U.S. 574, 576 (1959), and "does not imply approval of the decision for which review is sought or of its supporting opinion." Elgin, Joliet and E. Ry. Co. v. Gibson, 355 U.S. 897 (1957) (memorandum of Frankfurter, J.).

beyond a "substantial doubt," a doubt for which the jurors could give a reason, and a "serious or strong and well-founded doubt." The Court's holding in Cage is equally applicable to this case, and requires that habeas corpus relief be granted.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari previously filed, the Court should grant the writ and reverse the judgment of the court of appeals.

Respectfully submitted,

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April 21, 1991.

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April 22, 1991

90-7469

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Donald Henry Gaskins v. Kenneth D. McKellar

Dear Mr. Suter:

Enclosed please find for filing, with proof of service, the original and nine (9) copies of petitioner's reply to respondents' brief in opposition in the above captioned matter.

Very truly yours,

John H. Blume

JHB/cag
Enclosure

c: Donald J. Zelenka, Esq.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-7469

DONALD HENRY GASKINS,

Petitioner,

v.

KENNETH D. MCKELLAR, Warden, South Carolina Department of Corrections, and the Attorney General of South Carolina,

Respondent.

CERTIFICATE OF SERVICE BY MAIL

I do hereby certify that I have served upon the attorney for the Respondent petitioner's reply to respondents' brief in opposition to the writ of certiorari to the United States Court of Appeals for the Fourth Circuit in this action by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Donald J. Zelenka, Esq.
Chief Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

This the 22nd day of April, 1991, in Columbia, South Carolina.

John H. Blume

(5)

SUPREME COURT OF THE UNITED STATES

DONALD H. GASKINS *v.* KENNETH D. McKELLAR, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 90–7469. Decided June 3, 1991

The petition for a writ of certiorari is denied.

Opinion of JUSTICE STEVENS, respecting the denial of the petition for a writ of certiorari.

One of the questions presented in the certiorari petition is whether our *per curiam* decision in *Cage* v. *Louisiana*, —— U. S. —— (1990), announced a new rule. This question, however, would only be presented by the record if the instructions in this case contained the same flaw as the instructions in *Cage*. In *Cage*, the jury was instructed that a reasonable doubt "must be a doubt as would give rise to a grave uncertainty. . . ." *Id.*, at ——. Because the instructions to the jury in this case did not contain this improper language, the question whether *Cage* announced a new rule is not actually presented here. For this reason, I think the Court has correctly decided not to grant certiorari to review that question.

JUSTICE MARSHALL, dissenting:

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE BLACKMUN would grant the petition for a writ of certiorari, vacate the judgment and remand the case to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Yates* v. *Evatt*, 500 U. S. —— (1991).